Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JANIS CARMONA

Petitioner

v.

JUDY CARMONA,
HILTON HOTELS CORPORATION RETIREMENT PLAN

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Rooker-Feldman doctrine recognizes that federal district courts do not have subject matter jurisdiction to hear appeals from state court decisions. Precisely stated, the doctrine bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Inds. Corp.*, 544 U.S. 280, 284 (2005). A split has developed between the Courts of Appeal, however, about whether state court judgments over subject matter that falls within the federal courts' exclusive jurisdiction may be collaterally attacked in a district court, without running afoul of the doctrine. In an amended published opinion, the United States Court of Appeals for the Ninth Circuit held that Rooker-Feldman barred ERISA claims brought under 29 U.S.C. § 1132(a)(3), which fall within the exclusive purview of the federal courts under 29 U.S.C. § 1132(e)(1), because the plaintiff failed to timely remove her original state court divorce proceeding and a judgment had already been entered.

The question presented is:

Whether the court of appeals correctly applied the long-settled rule of law that, where Congress explicitly grants exclusive jurisdiction to federal courts, Rooker-Feldman cannot bar collateral review of a state court order that improperly decided a question falling exclusively within the jurisdiction of the federal courts.

PARTIES TO THE PROCEEDINGS[1]

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Court of Appeals for the Ninth Circuit:

The petitioner here, and plaintiff below, is Janis Carmona, eighth wife to decedent Lupe Carmona.

The respondents here, and defendants below, are Judy Carmona, Lupe's ninth wife, and the Hilton Hotels Corporation Retirement Plan.

Nevada Resort Association International Alliance of Theatrical and Stage Employees Local 720 Pension Trust filed a cross-claim against Judy Carmona, who was the cross-defendant to that action.

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[1] Because they share the same last name, the Carmonas – *viz.*, Lupe, Janis, and Judy – will be referred to by their first names in this petition.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Statement Of Jurisdiction 1

Statutory and Regulatory Provisions 2

Statement of Case 7

Summary of Argument 14

Argument 16

I. Despite this Court's efforts in *Exxon Mobil Corp.*, a Circuit-split remains over whether the *Rooker-Feldman* doctrine bars a "state court loser" from collaterally attacking a state court judgment in the United States District Court, when Congress grants federal courts exclusive jurisdiction over the subject matter of that judgment 16

II. The Ninth Circuit created a circuit-split by requiring ERISA participants and beneficiaries to remove their garden-variety divorce proceedings (within thirty-days of receiving the complaint) to federal court, regardless of whether the only federal issue is a *potential* conflict preemption defense, or lose the right to proceed in federal court with any future ERISA claim..... 19

Conclusion 23

Appendix

Appendix A: Ninth Circuit Amended Opinion (May 4, 2010)..... 1a

Appendix B: District Court Memorandum, (Sept. 30, 2005)..... 44a

Appendix C: Nevada Supreme Court Order, (Oct. 21, 2009) 56a

Appendix D: Ninth Circuit Order re Rehearing, (Sept. 10, 2010)..... 65a

Appendix E: Ninth Circuit Order Staying Mandate, (Sept. 21, 2010)..... 68a

Appendix F: Lupe Complaint for Divorce, (Oct. 27, 1994) 70a

Appendix G: Janis Answer to Complaint and Counter-claim, (Nov. 23, 1994)..... 76a

TABLE OF AUTHORITIES

Cases

1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. v. Nobers, 968 F.2d 401 (3rd Cir. Pa. 1992) 14

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)..... 19

Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003)..... 20

Carmona v. Carmona, 2003 WL 25914267 (Nev. Oct. 21, 2003)..... 1

Carmona v. Carmona, 541 U.S. 989 (April 19, 2004) 1, 10

Carmona v. Carmona, 544 F.3d 988 (9th Cir. Sept. 17, 2008) 1

Carmona v. Carmona, 603 F.3d 1041 (9th Cir. May 4, 2010) 1

Carmona v. Hilton Hotels Corp. Retirement Plan, 2005 WL 6563968 (D.Nev. Sept. 30, 2005) 1

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)..... 19, 21

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)..... 13, 16

Exxon Mobil Corp. v. Saudi Basic Inds. Corp.,
544 U.S. 280 (2005) 1, 12, 16, 17

Franchise Tax Bd. v.
Construction Laborers Vacation Trust,
463 U.S. 1 (1983) 20

General Motors Corp. v. Buha,
623 F.2d 455 (6th Cir. 1980) 14

Gilbert v. Burlington Industries, Inc.,
765 F.2d 320 (2nd Cir. 1985) 14

Henrichs v. Valley View Dev.,
474 F.3d 609 (9th Cir. 2007) 18

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975) 16

In re Ferren,
203 F.3d 559 (8th Cir. 2000) 17

In re Gruntz,
202 F.3d 1074 (9th Cir. 2000) 17, 18

In re James,
940 F.2d 46 (3rd Cir. 1991) 17

Lance v. Dennis,
546 U.S. 459 (2006) 16

Leonelli v. Pennwalt Corp.,
887 F.2d 1195 (2nd Cir. 1989) 22

Louisville & Nashville R.R. v. Mottley,
211 U.S. 149 (1908) 19

Noel v. Hall,
341 F.3d 1148 (9th Cir. 2003) 13

Rivet v. Regions Bank,
522 U.S. 470 (1988) 19, 20

Rooker v. Fidelity Trust Co.,
263 U.S. 413 (1923) 16

Singleton v. Fifth Third Bank (In re Singleton),
230 B.R. 533 (B.A.P. 6th Cir. 1999) 17

Total Plan Services v. Texas Retailers Association,
925 F.2d 142 (5th Cir. 1991) 14

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,
535 U.S. 635 (2002) 17

Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan,
263 F.3d 196 (2nd Cir. 2001) 22

Statutes

28 U.S.C. § 1257 ..... 16, 18

28 U.S.C. § 1331 19

28 U.S.C. § 1441(a) 19

28 U.S.C. § 1441(b) 19, 21

28 U.S.C. § 1446(b) 12

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2283 14

29 U.S.C. § 1132(a) 10, 15

29 U.S.C. § 1132(a)(1)(B) 10, 13, 22

29 U.S.C. § 1132(a)(3) 11, 12

29 U.S.C. § 1132(e)(1) 11, 12, 17, 18

29 U.S.C. § 1144(a) 9, 10, 17

Other Authorities

The Division of Retirement Benefits Through Qualified Domestic Relations Orders, United States Department of Labor, Employee Benefits Security Administration, available http://www.dol.gov/ebsa/publications/qdros.html 7

Statistical Abstract of the United States: 2006, Table 72, U.S. Census Bureau, available http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf 7

Statistical Abstract of the United States: 2008, Table 57, U.S. Census Bureau, available http://www.census.gov/compendia/statab/2010/tables/10s0057.pdf 7

PETITION FOR WRIT OF CERTIORARI

Janis Carmona respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals is reported at 603 F.3d 1041. *Pet. App. 1a-43a.* The original opinion is reported at 544 F.3d 988. The relevant opinions of the district court are unreported but available at 2005 WL 6563968. *Pet. App. 44a-55a.* The unpublished Nevada Supreme Court opinion cited in these opinions can be found at 2003 WL 25914267. *Pet. App. 56a-64a.* This Court denied a petition for writ of certiorari to review that unpublished Nevada opinion on April 19, 2004, which can be found at 541 U.S. 989.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was stayed on September 21, 2010. *Pet. App. 68a-69a.* A petition for rehearing was denied on September 10, 2010. *Pet. App. 65a-67a.* The petition was timely filed on June 16, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Section 1257 of Title 28 of the United States Code provides:

State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

* * * * * * * * * * *

Section 1331 of Title 28 of the United States Code provides:

> Federal question
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

* * * * * * * * * * *

Section 1441 of Title 28 of the United States Code provides in pertinent part:

> Actions removable generally
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter [28 U.S.C. §§ 1441 et seq.], the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the

parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. ...

* * * * * * * * * * * *

Section 1446 of Title 28 of the United States Code provides in pertinent part:

Procedure for removal

...

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

* * * * * * * * * * * *

Section 1132 of Title 29 of the United States Code provides in pertinent part:

Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

...

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

[...]

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1) [29 U.S.C. § 1021(f)(1)]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under

paragraphs (1)(B) and (7) of subsection (a) of this section.

* * * * * * * * * * *

Section 1144 of Title 29 of the United States Code provides in pertinent part:

Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. This section shall take effect on January 1, 1975.

* * * * * * * * * * *

STATEMENT OF CASE

More than 46 million private wage and salary workers are currently covered by employer-provided retirement plans in the United States.[2] Of those workers, roughly 38% – *over 17 million Americans* – distribute retirement benefits through divorce proceedings.[3] Included in this statistic are Lupe and Janis Carmona (nee Kester). Lupe worked for the International Alliance of Theatrical Stage Employees (IATSE) and the Hilton Hotel Corporation (Hilton), and was eligible for pension benefits from both employers. *Pet. App. 57a.* He elected a qualified joint and survivor annuity (QJSA) option for married couples from his pensions, and listed Janis – his then current and eighth wife – as his survivor beneficiary. *Ibid.* Under the terms of these plans, Janis would receive a portion of Lupe's monthly pension benefits upon his death if she survived him. *Id at 9a.* Lupe retired in 1992 and began drawing his pensions. But with

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[2] United States Department of Labor, Employee Benefits Security Administration, *The Division of Retirement Benefits Through Qualified Domestic Relations Orders*, at p. 1, available http://www.dol.gov/ebsa/publications/qdros.html (last viewed December 6, 2010) ("*QDRO manual*")

[3] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Table 72 available http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf (last viewed Dec. 2, 2010) (roughly 50% of marriages end in divorce); U.S. Census Bureau, Statistical Abstract of the United States: 2008, Table 57, available http://www.census.gov/compendia/statab/2010/tables/10s0057.pdf (last viewed Dec. 2, 2010) (roughly 75% of individuals married or divorced).

retirement came the unpleasant realization that Janis and Lupe did not like each other, and Lupe filed a complaint for divorce on October 27, 1994, seeking, *inter alia*, his pension benefits from IATSE and Hilton. *Pet. App. 70a-75a*. Janis answered that complaint on November 23, 1994, and counter-claimed that she had a community property interest in both pensions. *Pet. App. 76a-85a*. Neither party included allegations that their rights to benefits under the plans, or that their statutory rights under ERISA, had been violated. *Ibid.* Nor did the couple name the IATSE and Hilton plans, their fiduciaries or their administrators as parties to the divorce, or join them in later proceedings. *Ibid.* Lupe was eventually awarded his pensions as separate property, but ordered to pay Janis $1,500 for her marital portion. *Pet. App. 57a*.

Shortly after his divorce from Janis in 1997, Lupe married Judy Carmona (nee Walkington) and attempted to change the designation of his survivor beneficiary from Janis to Judy. *Ibid.* Representatives of both Hilton and IATSE, however, told Lupe that he could not change his beneficiary after retiring. *Ibid.* The Hilton representative added that ERISA prohibited such a change unless a qualified domestic relations order (QDRO), which "waives the spouse's right to survivor benefits [if] served on the Plan," was issued. *Ibid.* Lupe asked the Nevada family court to enter a QDRO ordering his pension plan administrators to grant his election of a new survivor beneficiary. *Ibid.* At first, it refused. *Pet. App. 58a*. But after Lupe's death, the family court relented, finding that the parties had agreed that Lupe's retirement benefits, including the survivor

benefits, were his sole and separate property. *Pet. App. 58a*. The family court thus ordered the plan administrators to change the survivor beneficiary in accordance with Lupe's request, and if they did not, the family court stated that it would "Order the establishment of a Constructive Trust for the benefit of Lupe's designated beneficiary wherein the survivorship funds, if received by Janis, will be held in trust for receipt by Lupe's designated beneficiary." *Ibid.* Because neither plan had appeared in the divorce proceedings, *Pet. App. 53a*, the family court eventually ordered Janis to establish a constructive trust of the survivorship funds from Lupe's-retirement plans for the benefit of Judy. *Pet. App. 58a*.

Janis appealed to the Nevada Supreme Court, claiming that ERISA, *i.e.*, 29 U.S.C. § 1144(a), preempted the family court's transfer of her surviving spouse interest to Judy. *Pet. App. 59a-64a*. Recognizing that both of Lupe's pensions were regulated by ERISA, and admitting that the interplay between ERISA and state law is not always clear, the Nevada Supreme Court nevertheless affirmed the judgment on the grounds that neither the transfer nor the constructive trust violated ERISA. *Ibid.* Specifically, the Nevada Supreme Court held that Janis had waived her interest by accepting $1,500 from Lupe and that a constructive trust was a perfectly acceptable instrument to transfer that interest. *Pet. App. 60a-61*. The Nevada Supreme Court also affirmed the family court's order that Janis pay Judy $15,000 in attorney fees under state law, based on "the various and extensive proceedings" surrounding her opposition to that transfer. *Pet. App. 64a*. A petition

to this Court met with a similar fate. *Pet. App. 48a*, citing 541 U.S. 989 (Janis' petition for certiorari denied).

While the appeal of her federal conflict preemption defense was pending in the Nevada Supreme Court, Janis filed a complaint in the United States District Court for the District of Nevada based on an unlawful denial of plan benefits under 29 U.S.C. § 1132(a)(1)(B). *Ibid.* But the district court dismissed that lawsuit under the Rooker-Feldman doctrine on the grounds that ERISA permitted state and federal courts to exercise concurrent jurisdiction over ERISA lawsuits for benefits, and the district court would not "relitigate issues where another court had jurisdiction and made a final determination." *Pet. App. 48a.* Janis then attempted to remove her divorce proceedings to federal court – even though neither she nor her ex-husband had alleged an ERISA claim and the only federal issue was a conflict preemption defense, (29 U.S.C. §§ 1132(a), 1144(a), respectively) – in an attempt to preserve her rights under ERISA. *Pet. App. 49a.* But she was again rebuked by the district court, which found that she had failed to timely remove her divorce proceedings and, thus, had waived the right to remove her ERISA claim. *Ibid.* Once again, the district court cited to the Rooker-Feldman doctrine and told Janis that a "United States District Court does not have the authority to review a final judgment" of a state court proceeding. *Ibid.*

Undaunted, Janis filed a *third* federal lawsuit to prevent the unlawful transfer of her surviving spouse interest in the QJSA. *Pet. App. 49a.* This time, however, she alleged that her statutory rights under ERISA – not her right to benefits under the terms of the plan – were violated and, thus, she was entitled to equitable relief under 29 U.S.C. § 1132(a)(3). *Ibid.* Unlike her previous lawsuits, this claim could not be prosecuted in state court, as ERISA grants federal courts exclusive jurisdiction over these matters. 29 U.S.C. § 1132(e)(1). *Pet. App. 49a, 51a.* Another distinction was that, for the first time, Janis named the Hilton and IATSE plans and fiduciaries as defendants (along with Judy). Having finally appeared, the IATSE trustees filed a cross-claim for declaratory relief against Judy averring parallel ERISA allegations, *viz.*, the Nevada family court's involuntary transfer of Janis' surviving spouse interest to Judy violated ERISA and was, thus, preempted. *Pet. App. 49a-50a.* But, once again, the district court refused to entertain Janis' lawsuit because of the Rooker-Feldman doctrine. *Pet. App. 49a-52a.*

Acknowledging that Rooker-Feldman did not apply when Congress grants exclusive jurisdiction to the federal courts, and that Congress granted federal courts exclusive jurisdiction over ERISA claims brought under 29 U.S.C. § 1132(a)(3), the district court nevertheless dismissed Janis' third lawsuit for want of subject matter jurisdiction on two grounds: *First,* no matter how artfully Janis worded her complaint, she was still inviting the district court to review and reject the Nevada Supreme Court determinations, which the district court could not do under this Court's holding in

Exxon Mobil Corporation v. Saudi Basic Inds. Corp., 544 U.S. 280, 284 (2005). *Pet. App. 50a-51a. Second,* because the Nevada family court had concurrent jurisdiction over her ERISA claim for benefits, *i.e.*, 29 U.S.C. § 1132(e)(1), Janis implicitly subjected herself to the final determination of her 29 U.S.C. § 1132(a)(3) claim, and waived the right to have her ERISA claim heard in federal court by failing to remove her original divorce proceedings before the thirty-day deadline expired under 28 U.S.C. § 1446(b). *Pet. App. 51a-52a.* And even though it denied Judy's motion to dismiss IATSE's cross-claim under the Rooker-Feldman doctrine on the grounds that it (the plan) could not qualify as "state court loser" because it was not a party to the divorce proceedings, the district court eventually concluded that the Nevada family court's transfer of Janis' surviving spouse interest in the QJSA was proper and, thus, dismissed that cross-claim on the merits. *Pet. App. 12a.*

Both IATSE and Janis appealed to the Ninth Circuit, which – in a strange turn of events – *agreed* that the Nevada family court had violated ERISA by unlawfully transferring Janis' surviving spouse interest in the QJSA and, thus, ran afoul of ERISA's conflict preemption. *Pet. App. 19a-42a.* But despite affirming IATSE's cross-claim on the merits, the court of appeals refused to reverse the district court's decline of subject matter jurisdiction over Janis' ERISA claim under the Rooker-Feldman doctrine. *Pet. App. 13a-19a.* Specifically, the Ninth Circuit agreed with the district court that Rooker-Feldman was applicable because, like *Feldman,* Janis did not argue that either Judy or Hilton caused her injury. *Pet. App. 16a,* citing

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Rather, Janis complained of a "harm caused by a state court judgment that directly withholds a benefit from [her] ... based on an allegedly erroneous ruling by that court," and thus constituted an improper *de facto* appeal of a state court judgment. *Pet. App. 16a*, quoting *Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003). Finally, the Ninth Circuit agreed with the district court that, while her last lawsuit, as pleaded, arose under the exclusive jurisdiction of federal courts, when the parties proceeded initially, the state court had concurrent jurisdiction to hear the ERISA claim under 29 U.S.C. § 1132(a)(1)(B). *Ibid.* Since Janis failed to remove those proceedings to federal court, she implicitly subjected herself to the final determination of the state court. *Ibid.* Because Congress had established concurrent jurisdiction at that time, the Ninth Circuit reasoned, it did not intend to prevent the Rooker-Feldman jurisdictional bar. *Ibid.* "Although Janis may have been right on the underlying substantive issue," the Ninth Circuit concluded, "she already had her day in court on the question and, under the circumstances, is barred under the Rooker-Feldman doctrine from seeking recourse in federal court at this time." *Pet. App. 42a.*

It is from this tortured procedural history that Janis has, once again, petitioned this Court for certiorari.

SUMMARY OF ARGUMENT

There is a split in the Courts of Appeal over whether the Rooker-Feldman doctrine prevents United States District Courts from exercising jurisdiction over cases brought by "state-court losers" seeking federal court review of "state-court judgments" on the grounds that Congress explicitly granted exclusive jurisdiction of the subject matter to federal courts.[4] This split not only exists in Bankruptcy appeals, it has now crept its way into ERISA as the result of the decision handed down by the Ninth Circuit in the instant action. The net effect of that decision is to grant to state courts – by way of a misapplication of the Rooker-Feldman doctrine – the power to decide matters that fall squarely within the exclusive purview of the federal courts.

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[4] A similar circuit-split exists over the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits district courts (with certain exceptions) from "grant[ing] an injunction to stay proceedings in a State court," and whether that Act applies to state court judgments that conflict with ERISA. *See, e.g., General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980), citing *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 329 (2nd Cir. 1985) (Anti-Injunction Act applies to state judgments that conflict with ERISA); *but see also Total Plan Services v. Texas Retailers Association*, 925 F.2d 142, 145, n.2 (5th Cir. 1991) (rejecting *Buha*). Accord, *1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. v. Nobers*, 968 F.2d 401 (3rd Cir. Pa. 1992) (recognizing conflict between circuits without deciding).

The panel also created both an intra-circuit split and an inter-circuit-split – and ran afoul of this Court's precedent – by holding that Janis could remove her divorce proceedings to federal court. Under the removal statute, a case filed in state court may be removed to federal court when it "arises under" federal law. Normally, a cause of action is deemed to arise under federal law only when issues of federal law appear on the face of the plaintiff's complaint. Removal is not permitted if federal law provides only a defense, even if the defense is that state law is preempted under conflict preemption or ordinary field preemption analysis. Under the "complete preemption" doctrine, however, a claim that is brought under state law is properly viewed as federal in character and thus removable to federal court if Congress has created an exclusive federal cause of action that occupies the field in which the plaintiff's claim arises. This doctrine has been applied in the ERISA context where a state court action that comes within the scope of 29 U.S.C. § 1132(a) is re-characterized as an action arising under federal law for purposes of removal jurisdiction. The Ninth Circuit, however, carved out an exception for ERISA cases, requiring plan participants and beneficiaries to remove their state court divorce proceedings to federal court within thirty-days of receiving the complaint or forever lose their right to have a federal court decide a question Congress intended be exclusive to the federal courts.

ARGUMENT

I. Despite this Court's efforts, a Circuit-split remains over whether the *Rooker-Feldman* doctrine bars a "state court loser" from collaterally attacking a state court judgment in the United States District Court, when Congress grants federal courts exclusive jurisdiction over the subject matter of that judgment.

The Rooker-Feldman doctrine recognizes that federal district courts do not have subject matter jurisdiction to hear appeals from state court decisions. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, (2005); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-16 (1923). Precisely stated, the doctrine bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon*, 544 U.S. at 284. This jurisdictional bar is one of congressional intent and not constitutional mandate. *Exxon,* 544 U.S. at 291. The doctrine is rooted both in 28 U.S.C. § 1257, which restricts the federal judiciary's direct review of state court judgments, and in notions of comity and federalism, which presume that state courts are willing and able to apply federal law and respect federal rights. *See Feldman*, 460 U.S. at 483 n.16; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610-611 (1975). Despite this Court's recent efforts to clarify Rooker-Feldman, *see, e.g., Lance v. Dennis,* 546 U.S. 459 (2006), *Exxon,* 544 U.S. at 284, a split remains in the Courts of Appeal over whether that doctrine

bars a "state court loser" from collaterally attacking a state court judgment in the United States District Court, when Congress grants federal courts exclusive jurisdiction over the subject matter of that judgment.

There already exists a split in the circuits over the question of bankruptcy courts reviewing state court judgments. *Compare, e.g., In re Gruntz, 202 F.3d 1074, 1079 (9th Cir. 2000) (en banc)* (Circuits accepting bankruptcy court exclusive jurisdiction to review state court judgments under Rooker-Feldman), and *In re James*, 940 F.2d 46, 52 (3rd Cir. 1991); *with, In re Ferren*, 203 F.3d 559, 560 (8th Cir. 2000), and *Singleton v. Fifth Third Bank (In re Singleton)*, 230 B.R. 533 (B.A.P. 6th Cir. 1999). This split has now reached the shores of ERISA. Under the Ninth Circuit's holding in this case, plan participants and beneficiaries lose the right to have federal courts review state court judgments – judgments which violate ERISA and would otherwise be conflict- or field-preempted – despite a clear and unequivocal statement by Congress that such claims be brought exclusively in federal court. 29 U.S.C. §§ 1132(e)(1), 1144(a). Such a decision not only runs afoul of Congressional intent but also from this Court's prior instruction, which suggests that Rooker-Feldman provides no protection from claims where Congress has explicitly endowed federal courts with exclusive jurisdiction. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644, n.3, (2002) (noting that "the Rooker-Feldman doctrine merely recognizes" Congress' choice of where to vest original jurisdiction and appellate jurisdiction regarding various matters); *Exxon,* 544 U.S. at 292, n.8

("Congress, if so minded, may explicitly empower district courts to oversee certain state-court judgments and has done so, most notably, in authorizing federal habeas review of state prisoners' petitions."). Accord, *Henrichs v. Valley View Dev.*, 474 F.3d 609, 614 (9th Cir.), cert. denied, 552 U.S. 1037 (2007), citing *Gruntz*, 202 F.3d at 1079 (a state court judgment entered in a case that falls within the federal courts' exclusive jurisdiction may be collaterally attacked in a district court). Moreover, if Congress has the authority to deny direct review of state court judgments by United States District Courts under 28 U.S.C. § 1257, then the inference can be made, and fairly so, that Congress must also have the authority to grant sole and exclusive jurisdiction over ERISA claims to those same district courts under 28 U.S.C. § 1132(e)(1). The Ninth Circuit should not have presumed that a review of state court judgments was inconsistent with the Rooker-Feldman doctrine, especially when those same judgments clearly violate ERISA. In light of the current circuit-split, Janis would ask the Court to grant certiorari, and resolve this dispute once and for all.

II. The Ninth Circuit created a circuit-split by requiring ERISA participants and beneficiaries to remove their garden-variety divorce proceedings (within thirty-days of receiving the complaint) to federal court, regardless of whether the only federal issue is a potential conflict preemption defense, or lose the right to proceed in federal court with any future ERISA claim.

The Ninth Circuit also created a circuit-split by carving-out an exception for plan participants and beneficiaries initiating garden-variety divorce proceedings in state court – *i.e.*, remove those proceedings within thirty-days of receiving your complaint, regardless of whether the only federal issue is a *potential* conflict preemption defense – or lose the right to proceed in federal court. This exception runs afoul of the basic tenets regarding removal from state to federal court. A civil action filed in state court may only be removed to federal court if the plaintiff's claim "aris[es] under" federal law. 28 U.S.C. §§ 1331, 1441(a) and (b). An action arises under federal law when a federal question appears "on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). A defense is not part of a well-pleaded complaint; thus, when federal preemption is only a defense, as is ordinarily the case, preemption does not provide a basis for removal. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004). That is so "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only

question truly at issue in the case." *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1988), quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983). Ordinary preemption, however pervasive or obvious, "does not transform the plaintiff's state-law claims into federal claims but rather extinguishes them altogether." *Rivet*, 522 U.S. at 476.

An "independent corollary" to that rule is the principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd.*, 463 U.S. at 22. Thus, "if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Id.* at 24. In those circumstances, "a claim which comes within the scope of that [federal] cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).

The term "complete preemption" can be misleading; it differs from ordinary, defensive preemption not merely in degree, but in kind. Complete preemption occurs when (1) Congress has created an exclusive federal cause of action and, (2) under the facts set out in the complaint, the plaintiff's claim comes within the scope of that cause of action. *Beneficial Nat'l Bank*, 539 U.S. at 8-9; *see Franchise Tax Bd.*, 463 U.S. at 24; *Caterpillar*, 482 U.S. at 388-399. That conclusion follows from the plain language of the removal statute. When federal law provides a cause of action that occupies the field in which the plaintiff's

claim arises, the plaintiff's claim can arise only under federal law. And, as described above, the text of the removal statute clearly provides that any action "arising under" federal law "shall be removable" to federal court. 28 U.S.C. § 1441(b). Consequently, a state-law claim "may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 393.

The complete preemption rule advances the purposes of the removal statute without encroaching on the legitimate rights of plaintiffs or offending principles of comity and federalism. Federal question removal jurisdiction is designed both to promote the accurate and uniform interpretation of federal law by ensuring the availability of a forum with special expertise in that law and to protect the federal rights of defendants. The complete preemption rule advances those purposes because it ensures that defendants retain access to the district courts to litigate federal claims even when plaintiffs – artfully or inadvertently – incorrectly characterize those claims as arising under state law. At the same time, the rule also respects the autonomy of state courts. Removal is not permitted if federal law provides only a defense – even if the defense is that state law is preempted under conflict preemption or ordinary field preemption analysis. The complete preemption rule thus preserves both state court primacy in resolving questions of state law, and state court authority to determine in the

first instance whether state law must yield to contrary federal law, while authorizing removal when federal law actually provides the plaintiff's cause of action. In that circumstance, removal is entirely appropriate, because, in our federal system, federal courts have primary responsibility for resolving questions of federal law. The Ninth Circuit's holding that Janis waived her right to have her ERSIA claims heard in federal court because she failed to timely remove her original divorce proceedings runs head-long into this authority.

More importantly, none of the allegations in the complaint and counter-claim initiating Janis and Lupe's divorce aver, much less suggest, that either spouse was attempting to (1) redress violations of ERISA's fiduciary provisions, (2) enjoin a practice that violated ERISA, (3) obtain other equitable relief necessary to enforce ERISA or the terms of the plan, (4) recover benefits due under the terms of the plan, (5) enforce rights under the terms of a plan, or (6) clarify rights to future benefits under the terms of a plan. Nor were the IATSE and Hilton plans or their fiduciaries named in those divorce proceedings, further undercutting the Ninth Circuit's rationale. *Cf., Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan*, 263 F.3d 196, 207 (2nd Cir. 2001), citing 29 U.S.C. § 1132(a)(1)(B) and quoting *Leonelli v. Pennwalt Corp.*, 887 F.2d 1195, 1199 (2nd Cir. 1989) ("ERISA claims under that section may be brought only against 'the plan and the plan administrators and trustees . . . in their capacity as such . . .'"). Phrased somewhat differently, for more than thirteen years, Janis was burdened with an ERISA lawsuit that she never

filed, based on an erroneous interpretation of federal law that was sanctified by the Ninth Circuit. The harm caused by that error casts a shadow over the 17 million divorcing (or divorced) American workers, who will now have to file their divorce proceedings in, or remove those divorce proceedings to, federal court; or lose the right to (exclusive) federal court jurisdiction over any potential ERISA claim. Such an error cannot be left to stand.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari, reverse the judgment of the court of appeals, and remand this back to the Ninth Circuit for further proceedings.

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December 9, 2010

APPENDIX

APPENDIX

Appendix A: Ninth Circuit Amended Opinion, dated May 4, 2010 ..... 1a

Appendix B: District Court Memorandum, dated September 30, 2005..... 44a

Appendix C: Nevada Supreme Court Order, dated October 21, 2009 ..... 56a

Appendix D: Ninth Circuit Order re Rehearing, date September 10, 2010..... 65a

Appendix E: Ninth Circuit Order Staying Mandate, dated September 21, 2010..... 68a

Appendix F: Lupe Complaint for Divorce, dated October 27, 1994 ..... 70a

Appendix G: Janis Answer to Complaint and Counter-claim, dated November 23, 1994 ..... 76a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 06-15581, 06-15938

JANIS CARMONA,

Plaintiff,

v.

JUDY CARMONA; HILTON HOTELS CORPORATION, RETIREMENT PLAN,

Defendants,

v.

NEVADA RESORT ASSOCIATION INTERNATIONAL ALLIANCE OF THEATRICAL AND STATE EMPLOYEES LOCAL 720 PENSION TRUST (I.A.T.S.E. TRUSTEES),

Cross-Claimant-Appellant,

v.

JUDY CARMONA, SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA DECEASED,

Cross-Defendant-Appellee.

JANIS CARMONA, A.K.A. JANIS KESTER,

Plaintiff-Appellant,

v.

JUDY CARMONA, SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA DECEASED; HILTON HOTELS CORPORATION, RETIREMENT PLAN,

Defendants-Appellees.

ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Argued and Submitted
March 11, 2008

Filed Sept. 17, 2008
Amended May 4, 2010

Before: Hawkins, Thomas, and Clifton,
Circuit Judges

Opinion by Judge Clifton

ORDER

This court's opinion, filed September 17, 2008, is amended as follows:

1. At pages 13098 (2 times), 13099, 13102, 13113 (3 times including 2 times within note 13) of the slip opinion (544 F.3d at 998 (2 times), 1000, 1007 (3 times including 2 times within note 13)), replace <anti-alienation> with < antialienation > (without hyphen) to conform to the usage in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan,* --- U.S. ----, 129 S.Ct. 865, 172 L.Ed.2d 662 (2009).

2. On page 13090 of the slip opinion (544 F.3d at 993), replace <the Nevada family court, perhaps without taking into account the nature of the QJSA survivor annuities, granted> with <the Nevada family court, perhaps without taking into account either the nature of the QJSA survivor annuities or the terms of the plans, granted>.

3. On page 13097 of the slip opinion (544 F.3d at 998), following <ERISA pension plans must comply with participation, vesting, and funding requirements. *Id.*> add:

> <The statute also established "a straightforward rule of hewing to the directives of the plan documents," imposing on plan administrators a "bright-line requirement to follow plan documents in distributing benefits." *Kennedy v. Plan Administrator for DuPont Savings &*

Investment Plan, ---U.S. ----, 129 S.Ct. 865, 875, 876, 172 L.Ed.2d 662 (2009).>

4. Move the following language appearing on page 13100 of the slip opinion (544 F.3d at 999) to page 13099 of the slip opinion (544 F.3d at 998), between and qualified>:

> <A valid DRO can be any judgment, decree, or order which (1) "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant," and (2) "is made pursuant to a State domestic relations law." 29 U.S.C. § 1056(d)(3)(B)(ii).>

5. On page 13099 of the slip opinion (544 F.3d at 998), following Hamilton, 433 F.3d at 1096 (citing 29 U.S.C. § 1056(d)(3)(B)(i)(I)) (internal quotation marks omitted).>, add a new footnote 6 (and renumber subsequent footnotes):

> To be sure, a party can waive an entitlement to an interest without expressing that waiver in the form of a QDRO, as the Supreme Court recently held. Although the Fifth Circuit had held a waiver by a divorcing spouse expressed in a divorce decree ineffective under ERISA's antialienation provision because it was not expressed in a QDRO, the Court held that such a waiver of rights could be effective nonetheless. *Kennedy,* 129 S.Ct. at 870-74. That ability to alter the entitlement to benefits outside of a QDRO is limited to a waiver of rights,

however. It does not permit an assignment of interest to anyone else or an identification of an alternate payee; that still requires a QDRO to be effective under ERISA. *Id.* at 873.

6. On page 13100 of the slip opinion (544 F.3d at 1000), replace <Because Janis was Lupe's spouse at the time of his retirement, her remainder interests vested at the time of his retirement and no QDRO can reassign the benefits.> with <Because Janis was Lupe's spouse at the time of his retirement, IATSE argues that her remainder interests vested at the time of his retirement and no QDRO can reassign the benefits.>

7. On page 13107 of the slip opinion (544 F.3d at 1003), in the citation to *McGowan v. NJR Serv. Corp.* replace with <(omitted), *abrogated on other grounds by Kennedy,* --- U.S. ----, 129 S.Ct. 865, 172 L.Ed.2d 662.>.

8. On pages 13110-11 of the slip opinion (544 F.3d at 1005-06), replace the five paragraphs that begin with also argues that Janis waived her right> and end before the heading C. The Constructive Trust> with the following two paragraphs:

Judy also argues that Janis waived her right to the surviving spouse benefits by the property settlement when the state court entered its divorce decree. As the Supreme Court made clear in *Kennedy,* ERISA's antialienation provision does not prohibit a surviving spouse beneficiary from waiving his or her interest in plan benefits, but such

a waiver must also conform to plan procedures and instruments. Indeed, the Court concluded that the plan administrator in that case was not, under the terms of the plan, required to honor the waiver of benefits contained in the divorce decree and that the continued payment of benefits to the prior spouse was proper. *See Kennedy*, 129 S.Ct. at 874-78. Under the so-called "plan documents rule," plan administrators must "hew[ ] to the directives of the plan documents" rather than "examin[ing] a multitude of external documents that might purport to affect the dispensation of benefits" and becoming "drawn into litigation like this over the meaning and enforceability of purported waivers." *Id.* at 876, 877 (internal quotation marks omitted).

Both the IATSE plan documents and ERISA's statutory scheme allow for the waiver of surviving spouse benefits with both spouses' written consent during the benefits election period prior to the participant's retirement. 29 U.S.C. § 1055(c)(3). That procedure was not followed here. Judy has identified nothing in the IATSE plan documents which require the plan administrator to redirect surviving spouse benefits to Judy, who was not, at the time of retirement and vesting, either a present or former spouse. Even if it is assumed that Janis had the authority to disclaim benefits, there is nothing that provides for them to be assigned instead to Judy.

9. On page 13114 of the slip opinion (544 F.3d at 1007), following the sentence <It may not be that all constructive trusts instituted by state courts, particularly those that seek to recover ill-gotten gains, will have a sufficient connection with or reference to an ERISA plan to trigger ERISA's preemption provision.>, add a new footnote 15:

> In *Kennedy,* the Court explicitly declined to express a view on whether an action could have been brought to obtain benefits from the former spouse after they had been distributed to her. 129 S.Ct. at 875 n. 10.

The opinion, as amended, will thus appear as attached.

With the opinion as amended, the petition for rehearing en banc, filed October 2, 2008, is DENIED. If any party wishes to file a new petition for rehearing and/or petition for rehearing *en banc,* it may do so within 14 days from the date of this order.

OPINION

CLIFTON, Circuit Judge:

This case requires us to once again navigate the complex statutory scheme set out in the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 832, as amended, 29 U.S.C. § 1001 *et seq.*, and to answer an open question in this Circuit: whether or not a participant to an ERISA regulated Qualified Joint and Survivor Annuity ("QJSA") plan may change the surviving spouse beneficiary

after the participant has retired and the annuity has become payable.

The conflict here arises between the final two wives of Lupe Carmona, a participant in two ERISA regulated pension plans, the Hilton Hotels Pension Plan ("Hilton") and the Nevada Resort Association International Alliance of Theatrical Stage Employees Local Pension Trust ("IATSE"). Janis Carmona, Lupe's eighth wife and his spouse at the time of his retirement, appeals the district court's dismissal of her complaint for lack of jurisdiction against Hilton and Judy Carmona, Lupe's ninth wife and his spouse at the time of his death.[1] IATSE, Lupe's second pension plan provider, appeals the district court's grant of summary judgment in favor of Judy on its cross-claim. On the merits, both IATSE and Janis argue that Janis, as Lupe's spouse at the time of his retirement, is the rightful surviving spouse beneficiary for the purposes of Lupe's retirement plan because her interest in surviving spouse benefits irrevocably vested at the time of Lupe's retirement.

Joining the Fourth Circuit, as well as a number of other jurisdictions, we hold that QJSA surviving spouse benefits irrevocably vest in the participant's spouse at the time of the annuity start date – in

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[1] Because they share the same last name, in this opinion we refer to Lupe, Janis, and Judy by their first names.

this case the participant's retirement[2] – and may not be reassigned to a subsequent spouse. Applying that conclusion to the judgment entered by the district court in this case, we affirm in part and reverse in part.

I. Background

The essential facts of this case are undisputed. Lupe Carmona married his eighth wife,[3] Janis Carmona (nee Kester), in 1988. While they were married, Lupe designated Janis as his survivor beneficiary under two pension plans which provided QJSA benefits, Hilton and IATSE. Under the terms of these plans, Janis would receive a portion of Lupe's monthly pension benefits upon his death if she survived him. After naming Janis as the survivor beneficiary of both plans, Lupe retired and began collecting pension benefits under the

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[2] "Annuity start date" and "retirement date" are the same date in this case and we use the two terms synonymously. For the purposes of QJSA benefits, the retirement date and the annuity start date are often the same. As a result, most of the cases addressing this issue have also used "retirement date" synonymously with "annuity start date." We recognize that the terms may not always be synonymous: for example, a participant could retire early, but he or she may not receive benefit payments until a later date. For the purposes of this opinion, however, we need not determine what effect an early retirement would have on the vesting rules. We leave to another day whether the same vesting rules apply to a participant's early retirement.

[3] Although Lupe had many wives, the dispute in this case only concerns wives number eight and nine. None of the previous seven wives are involved in the present litigation.

plans in 1992. Then, in 1994, Lupe and Janis began divorce proceedings.

Prior to entry of the formal divorce decree, Lupe inquired into whether he could remove Janis as the named survivor beneficiary. The two plan administrators each refused to change the designated survivor spouse beneficiary and indicated that the designation was irrevocable upon Lupe's retirement. Nonetheless, in its 1997 divorce decree, the Nevada family court, perhaps without taking into account either the nature of the QJSA survivor annuities or the terms of the plans, granted Lupe both the IATSE and Hilton pensions as his sole and separate property. The family court awarded Janis her own pension plan as her sole and separate property as well. Because there was a difference between the value of the pension awarded to Janis and the value of the pensions awarded to Lupe, the court also ordered that Lupe pay Janis $1500 "as and for an equalization of the values of the marital portion of the pensions divided."

In 1997, after his divorce from Janis had been finalized, Lupe married Judy Carmona (nee Walkington), his ninth and final spouse. He petitioned the family court for a Qualified Domestic Relations Order ("QDRO") revoking Janis's designation as the survivor beneficiary of the IATSE and Hilton pensions and substituting Judy, his new wife. Lupe died in 1999. Judy survived him, as did Janis. The day after Lupe's death, the family court concluded that Janis had waived her right to Lupe's pension plan benefits by the divorce decree's allocation of property and that Janis would

be unjustly enriched if she remained the survivor beneficiary. To avoid an inequitable result, the court ordered the plan administrators to change the survivor beneficiary from Janis to Judy. Alternatively, if the plans refused or were unable to change the beneficiary, the family court ordered the funds Janis received to be placed in a constructive trust with Judy as the beneficiary.

Janis appealed the family court's decision to the Nevada Supreme Court. In 2003, that court affirmed the family court order and concluded that ERISA did not preempt either the family court's order to change the beneficiaries or the constructive trust placed on the plan proceeds.[4] Janis sought review of the decision by the United States Supreme Court, but the Court denied certiorari.

Also during this time, Janis declared bankruptcy. The bankruptcy court also concluded that Janis did not have a legal or equitable interest in the survivor benefits from the two QJSAs.

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[4] While Janis was pursuing her original appeal through the Nevada system, she also brought suit in Nevada federal district court seeking to recover benefits under the terms of the ERISA pension plan. *See* 29 U.S.C. § 1132(a)(1)(B). Janis named the family court judge, Judy's attorneys, the Hilton Plan administrators and Judy in the suit. In 2001, before the Nevada Supreme Court made its final determination in the original case, District Judge Philip M. Pro dismissed the suit against all the defendants except for Hilton, concluding that the court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine. The district court later dismissed Hilton because Janis could not join Judy, an indispensable party.

In 2004, after the Nevada Supreme Court decision, the family court issued another order requiring Janis to deposit the survivor benefit funds into a constructive trust. At the same time, the family court also entered two orders, each labeled as a "Qualified Domestic Relations Order," directing the two plans to pay survivor benefits either to Judy or to the constructive trust. Janis attempted to remove the case to federal court but the federal district court remanded the action back to the family court, concluding that Janis had failed to timely file for removal and, in any event, that the *Rooker-Feldman* doctrine required the court to dismiss the suit for lack of jurisdiction.

This appeal originates from the most recent federal suit filed by Janis against Judy, Hilton, and IATSE. Janis brought suit under 29 U.S.C. § 1132(a)(3) seeking "to enjoin any act or practice which violates any provision [of ERISA] or the terms of the plan." In response to Janis's suit, IATSE Trustees filed a cross-claim against Judy seeking declaratory relief.

The district court concluded that the *Rooker-Feldman* doctrine barred Janis's suit against Judy and Hilton. The court also concluded that neither *Rooker-Feldman* nor res judicata barred IATSE's claim because it was not a party to the prior suits and was not in privity with Janis. On the merits, the district court concluded that ERISA does not preclude a state court from issuing a QDRO substituting an alternate payee for a surviving spouse after a plan participant's retirement. IATSE appeals the district court's denial of summary judgment and subsequent dismissal of its

complaint against Judy. Janis appeals the district court's decision that it lacked subject matter jurisdiction over Janis's claims against Hilton and Judy. We consider both appeals together because they arise from the same factual background.

II. Discussion

We review an application of the *Rooker-Feldman* doctrine de novo. *Noel v. Hall,* 341 F.3d 1148, 1154 (9th Cir.2003). The interpretation of ERISA, including whether ERISA preempts state law, is a question of law which we also review de novo. *Metropolitan Life Ins. Co. v. Parker,* 436 F.3d 1109, 1113 (9th Cir.2006); *Cleghorn v. Blue Shield of California,* 408 F.3d 1222, 1225 (9th Cir.2005).

A. The Rooker-Feldman Doctrine and Preclusion

We first consider whether any preclusion doctrine prevents Janis from bringing her claims against Judy and Hilton, or IATSE from bringing its declaratory judgment action. We agree with the district court and conclude that the district court lacked jurisdiction, under the *Rooker-Feldman* doctrine, to adjudicate Janis's claims against Judy and Hilton, but that IATSE is not precluded from asserting its cross-claim here.

The *Rooker-Feldman* doctrine takes its name from two Supreme Court cases: *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). It stands for the relatively straightforward principle that federal district

courts do not have jurisdiction to hear de facto appeals from state court judgments. *Noel,* 341 F.3d at 1155. The jurisdictional prohibition arises from a negative inference drawn from 28 U.S.C. § 1257 which grants jurisdiction to review state court decisions in the United States Supreme Court. *Kougasian v. TMSL, Inc.,* 359 F.3d 1136, 1139 (9th Cir.2004) (citation omitted). Because it grants jurisdiction to the Supreme Court, section 1257 impliedly prohibits lower federal courts from reviewing state court decisions. *Id.*

[1] Stated simply, the *Rooker-Feldman* doctrine bars suits "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indust. Corp.,* 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). In practice, the *Rooker-Feldman* doctrine is a fairly narrow preclusion doctrine, separate and distinct from res judicata and collateral estoppel. *See Noel,* 341 F.3d at 1162-64.

We have previously explained how federal courts should distinguish a forbidden de facto appeal of a state court decision that is barred by *Rooker-Feldman* from a suit that is barred by other preclusion principles. A suit brought in federal district court is a "de facto appeal" forbidden by *Rooker-Feldman* when "a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." *Id.* at 1164. In contrast, if a plaintiff "asserts as a legal wrong an

allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction." *Id.*

[2] Although it is often misapplied, we agree with the district court that *Rooker-Feldman* is applicable in this case, and therefore the district court was correct in dismissing Janis's claims for lack of jurisdiction. According to her amended complaint, Janis claimed that the family court orders were based upon an erroneous application of ERISA preemption law and that the family court unlawfully reassigned benefits in which she had an irrevocable vested interest. She sought relief from the state court orders and prayed for the federal district court to "order that the proceedings in Family Court in case number D181580 be dismissed with prejudice" and to enjoin enforcement of the orders. Thus she was asserting both that her injury was caused by a "legal error or errors by the state court" and that the appropriate remedy was "relief from the state court judgment." *Kougasian,* 359 F.3d at 1140.

The types of claims Janis presented in this case parallel those asserted in *Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206, one of the cases from which the doctrine takes its name. In *Feldman,* the federal plaintiffs sought admission to the District of Columbia bar. The local court refused to grant the plaintiffs waivers from the local rule that only graduates from accredited law schools could sit for the bar exam. The plaintiffs then filed suit in federal court. The plaintiffs sought declaratory judgments that the rule violated the Fifth Amendment, and injunctions that would

require the defendants to permit them to take the examination. One of the plaintiffs also sought the alternative relief of admission to the bar or a determination of whether his training provided him the same competence as graduates of accredited law schools. *See Feldman,* 460 U.S. at 468-69, 103 S.Ct. 1303. The appeals were consolidated and the Supreme Court held that the suit was a de facto appeal of the local court order to the extent that it sought review of the local court's denial of waiver. As such the district court lacked subject matter jurisdiction to hear the appeal. *Id.* at 482, 103 S.Ct. 1303.

[3] Like *Feldman,* Janis did not argue that either Judy or Hilton caused her injury, claims that would not be within the limits of *Rooker-Feldman. See Noel,* 341 F.3d at 1163. Rather, Janis complained of a "harm caused by a state court judgment that directly withholds a benefit from[her] ... based on an allegedly erroneous ruling by that court." *Id.* Her claim therefore fits within the narrow constraints of the Ninth Circuit's application of the *Rooker-Feldman* doctrine. We agree with the district court that it lacked jurisdiction to hear the merits of Janis's claims against Hilton and Judy because Janis's suit was a forbidden de facto appeal of a state court judgment.

[4] Janis also argues that *Rooker-Feldman* does not apply to state court orders that conflict with ERISA because ERISA grants exclusive jurisdiction to the federal courts. *Rooker-Feldman*'s jurisdictional bar is one of congressional intent and not constitutional mandate. *Mozes v. Mozes,* 239 F.3d 1067, 1085 n. 55 (9th Cir.2001). Where

Congress explicitly grants exclusive jurisdiction to federal courts, *Rooker-Feldman* cannot bar collateral review of a state court order in federal court. *See In re Gruntz,* 202 F.3d 1074, 1078-79 (9th Cir.2000) (en banc) (establishing that collateral review of state court proceedings in habeas and bankruptcy cases is not jurisdictionally barred under *Rooker-Feldman*); *see also Mozes,* 239 F.3d at 1085 n. 55; *G.C. and K.B. Inv., Inc. v. Wilson,* 326 F.3d 1096, 1103 n. 4 (9th Cir.2003).

[5] Although the present suit, as pleaded, arises under the exclusive jurisdiction of federal courts, when the parties proceeded initially, the state court had concurrent jurisdiction to hear the ERISA claim under 29 U.S.C. § 1132(a)(1)(B). In the state court proceedings, Janis failed to remove the proceedings to federal court and thus implicitly subjected herself to the final determination of the state court. Because Congress had established concurrent jurisdiction at that time, we conclude that it did not intend to prevent the *Rooker-Feldman* jurisdictional bar.

[6] Although Janis's claims are barred, IATSE's cross claim against Judy is not, even though it raises the same legal issue. Neither the law of the case doctrine nor state law res judicata principles bar IATSE's cross claim. The law of the case doctrine only applies to successive appeals in the same suit. *See Hsu v. County of Clark,* 123 Nev. 625, 173 P.3d 724, 730 n. 26 (2007). Where the suit involves a new party and new claims, as it does here, it is only res judicata, and not the law of the case doctrine, that may apply. *See id.*

[7] Similarly, res judicata does not preclude IATSE from establishing its obligations with respect to Judy and Janis. Under Nevada law, the party asserting res judicata must establish (1) the identical issue was already decided, (2) there was a final judgment on the merits, and (3) the suit involved the same party or their privies. *See Holcombe v. Hosmer*, 477 F.3d 1094, 1097-98 (9th Cir.2007); *Bennett v. Fid. & Deposit Co. of Md.*, 98 Nev. 449, 652 P.2d 1178, 1180 (1982). Res judicata does not apply here because IATSE was not a party to the first state court suit nor was it in privity with Janis. Although they advance similar arguments with a similar goal in mind-to establish that Lupe was precluded from changing Janis's beneficiary status after his retirement-they each maintain unique interests. IATSE must concern itself with the correct administration of its pension plans, and it has fiduciary duties distinct from the interests of the wives in this case. *See, e.g.*, 29 U.S.C. § 1104. Janis's interest is merely in receiving the remainder benefits to which she feels she is entitled. Because Janis and IATSE do not share an identity of interests, Janis's prior suits have no preclusive effect on IATSE's claim that the state court QDROs were insufficient to transfer benefits.[5] *See Taylor v. Sturgell*, 553 U.S. 880, 128

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[5] In addition to illustrating the pitfalls of interpreting ERISA, this case also illustrates the problems that arise when a plan trustee fails to join litigation until the eleventh hour despite the plan's ongoing interest in the outcome. Although we conclude that no legal doctrine prohibits IATSE from bringing the present declaratory judgment action, we agree with the district court that the plan trustee's failure to join itself to the litigation earlier was unnecessary and could have

S.Ct. 2161, 171 L.Ed.2d 155 (2008) (overruling *Kourtis v. Cameron,* 419 F.3d 989, 998 (9th Cir.2005) and narrowly construing circumstances in which a non-party may be bound by prior judgment); *LaForge v. State, Univ. and Cmty. College Sys. of Nev.,* 116 Nev. 415, 997 P.2d 130, 133 (2000). We turn now to the merits of the case, and the heart of the ERISA question.

B. The Effect of a Domestic Relations Order on Survivor Benefits

Congress originally enacted ERISA to protect the rights of workers who earn pension benefits and to encourage plan participation. PAUL J. SCHNEIDER, BRIAN M. PINHEIRO, ERISA: A COMPREHENSIVE GUIDE § 1.02 (3d ed.2008). In addition to protecting plan participants, Congress also sought to protect plan beneficiaries. *See Boggs v. Boggs,* 520 U.S. 833, 845, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997). In order to meet those ends Congress enacted an intricate, comprehensive statute that governs both pension and welfare plans. *Id.* at 841, 117 S.Ct. 1754. ERISA pension plans must comply with participation, vesting, and funding requirements. *Id.* The statute also established "a straightforward rule of hewing to the

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spared the parties involved great time and expense. We also note that while the result here may seem anomalous-IATSE may pay out benefits to Janis while Hilton may pay out benefits to Judy-we conclude that this is the result dictated by the unusual circumstances before us. The application of preclusion doctrines and jurisdictional bars cannot turn on the outcome of the underlying arguments on the merits.

directives of the plan documents," imposing on plan administrators a "bright-line requirement to follow plan documents in distributing benefits." *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, --- U.S. ----, 129 S.Ct. 865, 875, 876, 172 L.Ed.2d 662 (2009).

More recently, Congress further refined the statutory framework with the Retirement Equity Act of 1984 ("REA"), Pub.L. No. 98-397, 98 Stat. 1426, which particularly sought to protect the rights of surviving spouses. These amendments modified and strengthened the expansive coverage for surviving spouses by providing economic security through "a stream of income to surviving spouses," even after the participant's death. *Boggs*, 520 U.S. at 843, 117 S.Ct. 1754.

In order to protect surviving spouses in the event of the plan participant's death or divorce, ERISA provides for two types of survivor annuity benefits. *See Hamilton v. Wash. State Plumbing & Pipefitting Indus. Pension Plan*, 433 F.3d 1091, 1095 (9th Cir.2006). If a vested participant dies before the annuity start date and the participant is survived by a spouse, the surviving spouse is entitled to a qualified preretirement survivor annuity ("QPSA"). 29 U.S.C. § 1055(a)(2). Because Lupe died after retirement, his annuity benefits were paid in the form of the second type, a qualified joint and survivor annuity or "QJSA." 29 U.S.C. § 1055(a)(1). QJSA benefits arise when the participant does not die before the annuity starting date. *Id.* These benefits are payable to the plan participant for his lifetime after the annuity start date and, if the plan participant dies before his

spouse, the surviving spouse will receive no less than 50 percent of the amount of the annuity for the remainder of her lifetime. *See* 29 U.S.C. § 1055(d)(1)(A).

[8] "ERISA requires that every[QJSA] include an annuity payable to a nonparticipant surviving spouse." *Boggs*, 520 U.S. at 842, 117 S.Ct. 1754. These QJSA benefits are particular to the surviving spouse and may not be waived by the participant alone. *Id.* In order for a participant's spouse to waive her interests in QJSA benefits, the spouse must consent in writing, and in the presence of a plan representative or notary public, during the applicable election period. *See* 29 U.S.C. § 1055(c). Under these provisions, Janis, as Lupe's surviving spouse at the time of his retirement, was entitled to his QJSA benefits after his death. She did not waive her interest in the surviving spouse benefits during the applicable election period or consent to have Judy designated as the beneficiary. *See Boggs*, 520 U.S. at 842, 117 S.Ct. 1754. We must determine, then, whether other provisions of ERISA permit the Nevada family court to reassign the QJSA survivor benefits from Janis to Judy.

ERISA contains an antialienation provision and a preemption provision that restrict the ability of state courts and plan participants to transfer and alter interests in ERISA-governed retirement benefits. *See* 29 U.S.C. § 1056(d)(1) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."); 29 U.S.C. § 1144(a) (establishing that ERISA "supercede[s] any and all State laws insofar as they may ... relate to any employee benefit plan ...."). Despite this

broad preemption and antialienation scheme, Congress has recognized that states, in some circumstances, should be able to enforce their own domestic relations laws with respect to ERISA pensions. As a result, state domestic relations orders ("DROs") that comply with statutory requirements are exempt from both the antialienation and preemption provisions of ERISA. 29 U.S.C. § 1144(b)(7); 29 U.S.C. § 1056(d)(3); *Hamilton*, 433 F.3d at 1096 n.5. A valid DRO can be any judgment, decree, or order which (1) "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependant of a participant," and (2) "is made pursuant to a State domestic relations law." 29 U.S.C. § 1056(d)(3)(B)(ii). The qualified domestic relations order, or QDRO, "is a subset of domestic relations orders that recognizes the right of an alternate payee to receive all or a portion of the benefits payable with respect to a participant under the plan." *Hamilton*, 433 F.3d at 1096 (citing 29 U.S.C. § 1056(d)(3)(B)(i)(I)) (internal quotation marks omitted).[6]

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[6] To be sure, a party can waive an entitlement to an interest without expressing that waiver in the form of a QDRO, as the Supreme Court recently held. Although the Fifth Circuit had held a waiver by a divorcing spouse expressed in a divorce decree ineffective under ERISA's antialienation provision because it was not expressed in a QDRO, the Court held that such a waiver of rights could be effective nonetheless. *Kennedy*, 129 S.Ct. at 870-74. That ability to alter the entitlement to benefits out-side of a QDRO is limited to a waiver of rights, however. It does not permit an

Although state courts, via DROs, may create enforceable interests in the proceeds of an ERISA plan, there are limitations on the ability of state courts to create enforceable property interests in alternate payees. *See Trs. of the Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 420 (9th Cir.2000). First, in order for a DRO to be considered a QDRO, the state courts must fulfill certain specificity requirements. These requirements allow a plan administrator to more easily administer the plan and reduce the risk of making improper payments. *See Hamilton*, 433 F.3d at 1096-97 (citing *In re Gendreau*, 122 F.3d 815, 817-18 (9th Cir.1997)). A DRO meets the requirements of a QDRO and thus is enforceable only if the order "clearly specifies" (1) the name and mailing address of both the participant and the alternate payees, (2) the amount or percentage of the participant's benefits to be paid to each alternate payee, (3) the number of payments to which the order applies, and (4) the plan to which the order applies. 29 U.S.C. § 1056(d)(3)(C). If the state court fails to substantially comply with the statutory QDRO requirements, even a valid domestic relations order is not enforceable against a pension plan. *See Hamilton*, 433 F.3d at 1097.[7]

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assignment of interest to anyone else or an identification of an alternate payee; that still requires a QDRO to be effective under ERISA. *Id.* at 873.

[7] It was argued in this appeal that the relevant orders entered by the Nevada family court did not satisfy this specificity requirement, but we do not need to resolve that

Second, the DRO itself must create an enforceable interest that is permitted under ERISA's statutory scheme. *See Hamilton*, 433 F.3d at 1097-99. Among other things, a DRO is valid under ERISA only if it recognizes the existence of an alternate payee's right to receive benefits "payable with respect to a participant under a plan." *Id.* at § 1056(d)(3)(B)(i)(I). Additionally, a DRO may not require a plan to provide any type or form of benefit, or any option not otherwise provided by the plan, or to provide increased benefits to an alternate payee. *Id.* at § 1056(d)(3)(D).

The two limitations work together. The first limitation concerns the form of the state court order: the state DRO may create an alternate payee's enforceable interest, but the alternate payee may not enforce that interest unless and until he or she has complied with the QDRO specificity provisions. *See Tise*, 234 F.3d at 421. The second limitation is substantive: certain alterations to the benefits provided by a plan governed by ERISA are forbidden. Thus, in certain respects, ERISA limits what a state family court can order. *See Hamilton*, 433 F.3d at 1098-1110.

Based on these limitations, IATSE argues that the family court's orders cannot be valid QDROs and thus cannot divest Janis of her interest in the QJSA's survivor benefits because the state court

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issue, given our conclusion that the Nevada court's DROs did not create interests enforceable under ERISA's scheme.

orders were issued after Lupe's retirement. According to IATSE, surviving spouse benefits pursuant to a QJSA irrevocably vest in the participant's spouse at the time of the participant's retirement and cannot be altered or assigned. Because Janis was Lupe's spouse at the time of his retirement, IATSE argues that her remainder interests vested at the time of his retirement and no QDRO can reassign the benefits. Judy argues in response that ERISA contains no provisions limiting when a state court can issue a DRO to transfer QJSA benefits from a surviving spouse to an alternate payee, and therefore so long as the state court fulfills the specificity requirements of a QDRO it may create an enforceable interest at any time, even after a participant's retirement.

[9] This case presents an issue of first impression in this Circuit: whether a "plan participant's retirement cuts off a putative alternate payee's right to obtain an enforceable QDRO" with regard to the surviving spouse benefits of a QJSA. *Tise,* 234 F.3d at 423 n. 6. We are persuaded that IATSE's interpretation is correct and that the answer to this question is "Yes."

In *Hopkins v. AT&T Global Info. Solutions Co.,* 105 F.3d 153 (4th Cir.1997), the Fourth Circuit addressed a set of circumstances similar to the one presented here. In *Hopkins,* the ERISA plan participant divorced his first wife, Vera, in 1986 and was ordered to pay her alimony. *Id.* at 154. In order to collect the alimony, Vera obtained a judgment allowing her to attach her ex-husband's wages. *Id.* After his divorce from Vera, the

participant married his second wife, Sherry. Thereafter, in 1993, he retired. At that time Vera attempted to attach both his portion of the QJSA benefits and Sherry's surviving spouse benefits under the QJSA. *Id.*

The court closely examined 29 U.S.C. § 1056 and 29 U.S.C. § 1055, which regulate QDROs and QJSAs respectively, and concluded that surviving spouse benefits under a QJSA vest at the time of the participant's retirement. *Id.* at 155-156. In order to be "qualified," and thus enforceable, a DRO must create an alternate payee's right to benefits "payable with respect to a participant under a plan." *Id.*; 29 U.S.C. § 1056(d)(3)(B). According to *Hopkins*, if the surviving spouse benefits vested upon the participant's retirement, the DRO would relate to a benefit payable with respect to a beneficiary, not payable "with respect to a participant." *Id.* at 156. Thus, if the spouse's interest in the benefits vested upon the participant's retirement, the domestic relations order could not be qualified and could not be an exception to the preemption and antialienation provisions. *Id.*

[10] The court then analyzed 29 U.S.C. § 1055 and concluded that the participant spouse's QJSA surviving spouse rights "vest" upon the participant spouse's retirement.[8] *Id.* Various changes to ERISA

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[8] The *Hopkins* court did not distinguish between the annuity start date and the participant's retirement date. Indeed, in *Hopkins*, like the case before us, the two dates are the same.

created by the REA indicate that the participant's retirement or the start of the annuity establishes a vesting point for the surviving spouse benefits. First, the REA changed the QJSA surviving spouse benefits so that benefits may be paid to a spouse who was married to a participant at the participant's retirement, regardless of whether they were married at the participant's death. *Id.* Second, the REA made it more difficult for a participant to replace a QJSA with another type of benefit. The participant could only change the benefit within ninety days prior to retirement and with the spouse's written consent.[9] *Id.* at 156-57. Unless the participant changes the form of benefit with his current spouse's written permission, the participant is locked into a QJSA at retirement. *Id.* at 157. Moreover, after the retirement date, the form of benefit cannot be changed even with the spouse's consent. *Id.* Based upon the language in ERISA, as well as the changes made under the REA, the Fourth Circuit concluded that the plan participant's retirement created a vested interest in the surviving spouse, and thus Vera's DRO could never be "qualified" for the purposes of a QDRO. *Id.*

Judy contends that we should not rely upon the Fourth Circuit's reasoning in *Hopkins* because another Ninth Circuit case compels an outcome in her favor here. In *Tise*, we addressed the question whether an otherwise valid QDRO assigning other ERISA benefits (i.e., not QJSA benefits) can issue

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[9] Now, the applicable time period for an election of benefits is 180 days prior to retirement. *See* § 1055(c)(7)(A).

after the death of the plan participant. 234 F.3d at 415. The plaintiff, the mother of the plan participant's children, obtained a child support judgment against the participant prior to his death. *Id.* at 417-19. The plan participant died before retirement (and after marrying the surviving spouse), but before Tise was able to establish that the state court order met the specificity requirements for a QDRO. *Id.* We held that a state court order obtained prior to a participant's death or retirement creates an enforceable interest in the participant's surviving spouse benefits even if the alternate payee is unable to qualify the DRO before the participant's death. *Id.* at 423.

We came to this conclusion by analyzing the complex ERISA framework and meticulously considering the provisions of the statute that contemplate a situation in which a valid QDRO does not issue until after benefits become payable. We concluded that ERISA "specifically provides for situations in which no valid QDRO issues until after benefits become payable. Once the pension plan is on notice that a domestic relations order has issued that *may* be a QDRO, the plan may take a reasonable period to determine whether the order is a QDRO...." *Id.* at 421. Furthermore, ERISA provides for further state court proceedings after the initial DRO is issued to clarify and fix any technical defects in the original DRO. *Id.* at 422 (citing 29 U.S.C. § 1056(d)(3)). Therefore, we have held that so long as a valid DRO creates an alternate payee's legally enforceable property interest in QPSA benefits, a QDRO can be obtained even after the plan participant's death. *Id.* at 423.

In holding that an alternate payee may obtain a valid QDRO even after a plan participant's death, we rejected the first part of *Hopkins*'s logic, that once a spouse's rights to an annuity have vested a DRO cannot become a QDRO because the order can no longer be "payable with respect to a participant under a plan." *Id.* at 423-24. We concluded that "payable with respect to a participant" includes benefits payable *to* a participant as well as benefits payable to any beneficiaries that may be eligible to receive such benefit. *See id.* at 423, 423 n. 7. Therefore, section 1056(d)(3)(B)(I) does not, in and of itself, prohibit the assignment of surviving spouse benefits to an alternate payee, even after a plan participant has retired.

[11] While we recognize that *Tise* expressly, and we believe rightly, rejected part of the Fourth Circuit's reasoning in *Hopkins,* we are nonetheless persuaded by the structure and purpose of ERISA that the rule enunciated in *Hopkins* is the proper rule for QJSA benefits. Indeed, we expressly left open this possibility. *See id.* at 423 n. 6, 423 n. 7 ("Whether a QDRO issued after a plan participant's retirement may affect the distribution of surviving spouse benefits pursuant to 29 U.S.C. § 1055 implicates statutory provisions and policy considerations other than those here applicable.").

First, ERISA's statutory scheme for QJSA benefits establishes the importance of the annuity start date, which is often the participant's retirement date, on the benefits at issue. The plan providers must provide participants and their spouses with a QJSA. § 1055(a)(1). Under section 1055(c), QJSA benefits are automatically provided

to employees in all ERISA-governed plans. The only way for the participant to opt out of the QJSA is for the participant *and* his spouse together to waive the QJSA benefit plan in writing. *See* 29 U.S.C. § 1055(c)(1)-(2). Both spouses, if they are going to decline QJSA benefits, may only do so during the applicable election period which is defined as "the 180-day period ending on the annuity starting date."[10] *Id.* at § 1055(c)(2), (7). Thus, the annuity starting date, which in this case is Lupe's retirement date, is the point at which the surviving spouse benefits vest in the participant's spouse.[11]

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[10] This statutory construction makes it difficult to adopt the alternative rule that Judy urges. It is difficult to see how courts may reassign QJSA surviving spouse benefits at any time given the fact that the statutory scheme so diligently and strictly protects the interests of the participant's spouse at the time of the participant's retirement by establishing that the only way to avoid QJSA survivor benefits is by opting out in writing *before the retirement date.*

[11] The terms of the IATSE plan itself also suggest that the surviving spouse's interest vests at the time of Lupe's retirement. The plan informed Lupe that he would automatically be paid in the form of a QJSA if he was married at least 12 months prior to the benefit starting date (his retirement) unless he chose otherwise. It also established that the exact amount of monthly benefits payable to him and his spouse under the QJSA depended upon "the relative ages of you and your spouse at the *time of your retirement* " (emphasis added). Thus the plan established both that the type of plan and the amount of benefits were calculated at the time of retirement and the amount was calculated based on the relative ages of him and his spouse. This structure

[12] We are also persuaded, as was the Fourth Circuit in *Hopkins,* that a number of changes in ERISA, effectuated by the REA, established the importance of the participant's date of retirement as the moment at which the surviving spouse benefits vest. The fact that the REA established that surviving spouse benefits may now be paid to a spouse who is married on the day of the participant's retirement, regardless of whether the participant and spouse are married at the participant's death, suggests that the retirement date is the crucial date for establishing the rights of the surviving spouse. *Hopkins,* 105 F.3d at 156. Following this reasoning, we conclude that once a participant retires, the spouse at the time becomes the "surviving spouse" entitled to the QJSA benefits.

In addition to finding support for the *Hopkins* rule from the statutory scheme, we are also persuaded that the ultimate objectives of Congress are served by recognizing the rule that a QDRO may not reassign surviving spouse benefits after a plan participant has retired. *See Hamilton,* 433 F.3d at 1099 (noting that congressional intent ultimately determines whether or not a particular statutory interpretation applies to surviving spouse benefits); *Boggs,* 520 U.S. at 843, 117 S.Ct. 1754 (considering congressional intent when analyzing qualified joint and survivor annuity benefits).

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suggests that the benefits vested at retirement in the surviving spouse.

ERISA's surviving spouse benefits established in section 1055 were created in part "to ensure a stream of income to surviving spouses." *Boggs,* 520 U.S. at 843, 117 S.Ct. 1754. Specifically, Congress was concerned with providing for spouses that were not able to accrue their own set of retirement benefits independent from their working spouses. Prior to ERISA there was no requirement that retirement plans provide for an employee's spouse in the event that the employee predeceased a spouse not working outside the home ("non-working spouse"). Congress concluded that such a regime "[could] result in a hardship where an individual primarily dependent on his pension as a source of retirement income is unable to make adequate provision for his spouse's retirement years should he predecease her." H.R.Rep. No. 93-807, at 4732 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4732. Likewise, in amending ERISA through the REA, Congress adopted changes to the statutory scheme to take into account "changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home." Retirement Equity Act of 1984, Pub.L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 29 U.S.C.). Congress created surviving spouse benefits, like those found in QJSAs, to protect non-participant spouses, particularly those that may not work outside the home and thus may not have independent retirement benefits.

The *Hopkins* rule applied in this case may not clearly protect a non-working spouse whose interest in the surviving spouse benefits may have accrued over time, since Lupe was not married to either

Janis or Judy during most of his working years when he earned the pension benefits. Nonetheless, such a rule would protect a non-working spouse in many situations involving a post-retirement attempt to transfer surviving spouse benefits. The finely tuned congressional scheme would not be served by state court DROs that attempt to divest a non-working spouse's interest in her surviving spouse benefits. Similarly, congressional intent is not advanced by permitting a subsequent post-retirement spouse to collect benefits accrued during an economic partnership she or he was not a part of.[12]

Additionally, a vesting rule also promotes one of the principal goals underlying ERISA: "ensuring that plans be uniform in their interpretation and simple in their application." *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 246 (3d Cir.2005) (internal

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[12] We note that this view is advanced by the legislative history of the REA. The Senate Report notes that in theory "a qualified domestic relations order could provide that the former spouse is not entitled to any survivor benefits under the plan." S.Rep. No. 98-575, at 15 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2562. While we recognize that this passing note contradicts our conclusion that Janis's surviving spouse benefits vested at Lupe's retirement, we are nonetheless convinced that the structure of the statute, the purposes and policies undergirding ERISA, and the authority from other jurisdictions following this interpretation support our conclusion. Furthermore the note does not contradict the outcome here because Lupe did not seek to divest Janis of her surviving spouse rights, but rather attempted to replace her with Judy, something that neither the statutory language nor the legislative history permits.

quotation marks and citations omitted), *abrogated on other grounds by Kennedy*, --- U.S. ----, 129 S.Ct. 865, 172 L.Ed.2d 662. While administrative convenience is not entirely determinative of what is required of pension plans under ERISA, we are convinced that it should be a consideration when deciding whether the statutory scheme requires pension plans to act in a certain way.

Both the participant's post-retirement pension benefits and surviving spouse benefits under the QJSA are calculated based upon the life of the two spouses at the time the benefits become payable. The benefits payable to each are computed based upon the "actuarial equivalent of a single annuity for the life of the participant." 29 U.S.C. § 1055(d)(1)(A)-(B) (establishing that the participant receives pension benefits "for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of ... the amount of the annuity which is payable during the joint lives of the participant and the spouse"). The calculation and payment of the pension benefits mean that it is important for the plan administrators to know, with some finality, who the spouse is at the time that the benefits become payable:

> Because the disbursement of plan benefits is based on actuarial computations, the plan administrator must know the life expectancy of the person receiving the Surviving Spouse Benefits to determine the participant's monthly Pension Benefits. As a result, the plan administrator needs to know, on the

> day the participant retires, to whom the Surviving Spouse Benefit is payable.

Hopkins, 105 F.3d at 157 n. 7. Allowing participants to change surviving spouse beneficiaries after the participant has retired and already begun receiving benefit payments would make it difficult for trustees to administer plans based on the actuarial value of both the participant and the surviving spouse. We therefore agree with *Hopkins,* as well as with other courts that have either implicitly or explicitly concluded that the surviving spouse benefits irrevocably vest in the current spouse when the plan participant retires. *See Hopkins,* 105 F.3d at 157; *see also Rivers v. Central and South West Corp.,* 186 F.3d 681 (5th Cir.1999); *Walsh v. Woods,* 371 S.C. 319, 638 S.E.2d 85 (2006); *Hamilton,* 433 F.3d at 1096 (noting that problems in QDROs often go undetected "until the participant dies or retires, that is, when the survivor benefits irrevocably vest in the current spouse and it is too late to do anything about it") (quotation omitted); *Anderson v. Marshall,* 856 F.Supp. 604, 607 (D.Kan.1994); *cf. Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 897 F.2d 275 (7th Cir.1990) (en banc) (allowing the waiver of surviving spouse benefits as required in a divorce decree entered prior to the participant's retirement); *but see Torres v. Torres,* 100 Hawaii 397, 60 P.3d 798 (Haw.2003).

[13] Because the retirement of a plan participant ordinarily creates a vested interest in the surviving spouse at the time of the participant's retirement, we conclude that a DRO issued after the participant's retirement may not alter or assign

the surviving spouse's interest to a subsequent spouse. The Nevada family court's attempted transfer of interests in Janis's surviving spouse benefits to Judy is prohibited.

It is important to note that this opinion does not disturb our prior holding in *Tise*. Fundamentally, *Tise* answers a very different question from the one presented here. In *Tise*, we determined when a DRO, which creates an enforceable interest in an alternate payee, can be "qualified" for QPSA benefits. *Tise* established that a state court domestic relations order may be qualified even after a participant's death, "[b]ecause a QDRO only renders enforceable an already-existing interest." 234 F.3d at 421. In contrast, here we ask whether there are any restrictions as to when a state can create an enforceable interest in an alternate payee for QJSA surviving spouse benefits. We hold here only that a state DRO may not create an enforceable interest in surviving spouse benefits to an alternate payee after a participant's retirement, because ordinarily at retirement the surviving spouse's interest irrevocably vests.[13]

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[13] We say "ordinarily" because we recognize that there may be other situations, not present in this case, in which a contrary result may be appropriate. For example, it is possible that a former spouse could obtain a DRO prior to the annuity start date and present it to the plan, but the actual determination of whether the DRO is a QDRO might not be finalized prior to the date on which the benefit would normally become payable. *See, e.g.*, 29 U.S.C. § 1056(d)(3)(H).

Additionally, ERISA only permits state court DROs to reassign surviving spouse benefits if they meet the requirements of 29 U.S.C. § 1056(d)(3)(F). *Hamilton,* 433 F.3d at 1099. Section 1056(d)(3)(F) governs the use of QDROs to reassign benefits pursuant to 29 U.S.C. § 1055 and states that "to the extent provided in any qualified domestic relations order the former spouse of a participant shall be treated as a surviving spouse of such participant...." We have interpreted this provision as permitting a transfer of surviving spouse benefits established under section 1055 only if the QDRO expressly assigns surviving spouse rights to a former spouse. *See Hamilton,* 433 F.3d at 1099. Here, Judy is not a "former spouse" but rather is a "future" or "subsequent spouse" because she married Lupe after his retirement. *See Hopkins,* 105 F.3d at 157 n. 6. No part of ERISA contemplates reassignment of surviving spouse benefits to a future or subsequent spouse. We take Congress's silence with respect to the rights of a future or subsequent spouse to obtain control of surviving spouse benefits as "powerful support for the conclusion that the right does not exist." *Boggs,* 520 U.S. at 847-48, 117 S.Ct. 1754.

Judy also argues that Janis waived her right to the surviving spouse benefits by the property settlement when the state court entered its divorce decree. As the Supreme Court made clear in *Kennedy,* ERISA's antialienation provision does not prohibit a surviving spouse beneficiary from waiving his or her interest in plan benefits, but such a waiver must also conform to plan procedures and instruments. Indeed, the Court concluded that the plan administrator in that case was not, under

the terms of the plan, required to honor the waiver of benefits contained in the divorce decree and that the continued payment of benefits to the prior spouse was proper. *See Kennedy,* 129 S.Ct. at 874-78. Under the so-called "plan documents rule," plan administrators must "hew[ ] to the directives of the plan documents" rather than "examin[ing] a multitude of external documents that might purport to affect the dispensation of benefits" and becoming "drawn into litigation like this over the meaning and enforceability of purported waivers." *Id.* at 876, 877 (internal quotation marks omitted).

Both the IATSE plan documents and ERISA's statutory scheme allow for the waiver of surviving spouse benefits with both spouses' written consent during the benefits election period prior to the participant's retirement. 29 U.S.C. § 1055(c)(3). That procedure was not followed here. Judy has identified nothing in the IATSE plan documents which require the plan administrator to redirect surviving spouse benefits to Judy, who was not, at the time of retirement and vesting, either a present or former spouse. Even if it is assumed that Janis had the authority to disclaim benefits, there is nothing that provides for them to be assigned instead to Judy.

C. The Constructive Trust

IATSE also contends that it was impermissible for the state court to create a constructive trust on the annuity proceeds. We agree that a state law constructive trust cannot be used to contravene the dictates of ERISA.

ERISA preemption supercedes "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). The Supreme Court has observed that the preemption provision is "clearly expansive" but that it cannot be taken "to extend to the furthest stretch of its indeterminacy." *Egelhoff v. Egelhoff*, 532 U.S. 141, 146, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001) (citations and internal quotation marks omitted). A state law "relates to an ERISA plan if it has a connection with or reference to such a plan." *Id.* at 147, 121 S.Ct. 1322 (citations and internal quotation marks omitted). To determine whether a state law is preempted because it relates to an ERISA plan, the courts look to the nature and effect of the state law on ERISA plans as well as the objectives of the ERISA statute. *Id.*

In *Melton v. Melton*, the Seventh Circuit observed that "*Egelhoff* stands for the proposition that a state law cannot invalidate an ERISA plan beneficiary designation by mandating distribution to another person." 324 F.3d 941, 945 (7th Cir.2003) (citations omitted). The court applied that proposition to conclude that ERISA preempted a state court law that permitted the imposition of a constructive trust on ERISA proceeds. It concluded that the imposition of a constructive trust to subvert ERISA-mandated beneficiaries was directly controlled by *Egelhoff* and preempted by ERISA. *Id.* Thus the court held that state law doctrines (including constructive trusts) may not be invoked to assign benefits to parties other than those designated as beneficiaries under ERISA. *Id.*

Furthermore, as the Supreme Court concluded in *Boggs,* ERISA can preempt state law even after benefits have been disbursed to beneficiaries. 520 U.S. at 842 (rejecting the argument that state law can apply when it affects "only the disposition of plan proceeds after they have been disbursed by [the plan] and thus nothing is required of the plan"). Therefore a state court cannot achieve through a constructive trust on the proceeds of a pension plan what this court maintains it cannot achieve through a QDRO. Any alternative rule would allow for an end-run around ERISA's rules and Congress's policy objective of providing for certain beneficiaries, thereby greatly weakening, if not entirely abrogating, ERISA's broad preemption provision.

Judy relies upon our decision in *Emard v. Hughes Aircraft Co.,* 153 F.3d 949 (9th Cir.1998), for the proposition that once a plan distributes proceeds to the proper ERISA beneficiary, a state law created constructive trust is too attenuated to fall within the mandatory preemption provision. *Id.* at 954. *Emard,* however, was abrogated by *Egelhoff,* 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264, and thus *Emard*'s holding, to the extent it can be interpreted as an end-run around ERISA's mandates, no longer survives.[14]

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[14] Additionally, *Emard* addressed insurance benefits and not pension plan benefits. *Emard,* 153 F.3d at 953. As noted in *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990), ERISA's antialienation provision applies only to pension benefits and not welfare benefits. Thus an independent reason (the

[14] In this case, the constructive trust that the state court created was explicitly an attempt to avoid ERISA's QDRO, preemption, and antialienation provisions. We conclude that Congress did not intend to permit the reassignment of surviving spouse benefits and, therefore the constructive trust remedy that the state court tried to impose is also preempted by ERISA. It may not be that all constructive trusts instituted by state courts, particularly those that seek to recover ill-gotten gains, will have a sufficient connection with or reference to an ERISA plan to trigger ERISA's preemption provision.[15] But when a state court creates a constructive trust with the explicit purpose of avoiding ERISA's rules, it too must be preempted.

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antialienation provision) prohibits the use of constructive trusts to garnish pension benefits in this case. *See id.* at 371-72, 110 S.Ct. 680. In *Guidry*, the Supreme Court concluded that a constructive trust could not be used to disgorge a pension plan fiduciary's ill-gotten gains because it was prohibited by the antialienation provision of ERISA and did not meet any of the statutory exceptions to the ERISA provision. *See id.* at 372-376, 110 S.Ct. 680. On remand, the Tenth Circuit upheld the imposition of a constructive trust and concluded that ERISA did not prohibit post-payment garnishment of ill-gotten gains. *See Guidry v. Sheet Metal Workers Nat'l. Pension Fund*, 39 F.3d 1078 (10th Cir.1994) (en banc). This decision, too, preceded both *Egelhoff* and *Boggs*, and may not survive.

[15] In *Kennedy*, the Court explicitly declined to express a view on whether an action could have been brought to obtain benefits from the former spouse after they had been distributed to her. 129 S.Ct. at 875 n. 10.

Congress, through ERISA, has created a set of fixed property rules state courts are bound to work within. State family courts can and should distribute property in an equitable manner upon divorce, but they must take into account ERISA's rules. ERISA prohibits the state family court from steering the surviving spouse benefits from Janis to Judy, but ERISA did not prohibit the state court from dividing other property or making other adjustments mindful of the benefits provided under the ERISA plan. In this instance, the state family court provided for a transfer of $1500 from Lupe to Janis based upon the premise that Lupe and Janis would each retain their pension benefits as separate property. That premise may have been faulty, but that does not justify disregarding the ERISA limitations.

III. Conclusion

We conclude that Janis's lawsuit against both Hilton and Judy was properly dismissed by the district court for lack of subject matter jurisdiction. Although Janis may have been right on the underlying substantive issue, she already had her day in court on the question and, under the circumstances, is barred under the *Rooker-Feldman* doctrine from seeking recourse in federal court at this time.

IATSE's similar argument is not barred, however. We agree with its contention that it is not required to make payment of the surviving spouse benefits to Judy or to the constructive trust ordered by the Nevada family court. Under ERISA, Janis's interest in the surviving spouse benefits vested at

Lupe's retirement and federal law preempted the state court orders directing the plans to change the beneficiaries and creating a constructive trust.

We remand the matter to the district court for whatever further proceedings may be necessary and appropriate. Each party is to bear its own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-04-1310-KJD-RJJ

JANIS CARMONA, A.K.A. JANIS KESTER,

Plaintiff,

v.

HILTON HOTELS CORPORATION, RETIREMENT PLAN; JUDY CARMONA,

Defendants,

September 30, 2005.

ORDER

Presently before the Court is Defendant Judy Carmona's Motion to Dismiss the Amended Complaint and Cross-Claim (# 31). Plaintiff filed a response in opposition (# 33). Defendant Trustees of the Nevada Resort Association International Alliance of Theatrical and Stage Employees

("IATSE Trustees") also filed a response in opposition (# 32). Defendant Judy Carmona's motion and the oppositions all incorporated by reference the previous filings on Defendant Judy Carmona's Motion to Dismiss the Complaint (# 4) and Motion to Dismiss the Cross-Claim (# 18). The Court has considered all the briefs and exhibits filed in opposition to those motions and the corresponding replies and sur-replies.

The Court has also considered Defendant Judy Carmona's Motion for Extension of Time to File Opposition to the Motions for Summary Judgment (# 39). The Court **GRANTS** the motion to the extent that it seeks an extension of time to file an opposition to the IATSE Trustees' Motion for Summary Judgment (# 34). The remaining portions of the motion are **DENIED as moot,** because Defendant Judy Carmona voluntarily withdrew them.

I. Facts and Procedural History

This dispute concerns the survivorship benefits from Lupe N. Carmona's ("LUPE") pension plans with the IATSE Trustees and Hilton Hotels Retirement Plan ("HILTON"). Lupe originally designated Plaintiff Janis Carmona as the beneficiary of these plans, but he later petitioned the Clark County District Court, Family Division ("Family Court") for an order directing the pension plans to pay those benefits to Defendant Judy Carmona. Since that time the parties have litigated this issue at every level of state court as well as in Federal District Court, Federal Bankruptcy Court, the United States Supreme Court, and no doubt,

will argue the merits of this order before the Ninth Circuit Court of Appeals.

Lupe and Plaintiff married on March 7, 1988. On September 3, 1992, Lupe named Plaintiff as the beneficiary of survivor benefits on both fire HILTON and IATSE plans. Lupe retired on October 1, 992. On October 27, 1994, Lupe filed for divorce in Family Court. Prior to the divorce, both Lupe and Plaintiff contacted IATSE and HILTON to inquire whether he could change her as beneficiary. The providers informed them verbally and in writing that Plaintiff's designation as beneficiary was irrevocable.

Pursuant to a settlement conference, the Family Court granted Lupe both his IATSE and HILTON pensions as his sole and separate property. During the marriage, Lupe's benefits in his pension plans had increased more than Plaintiff's own pension. The Family Court ordered Lupe to pay Plaintiff $1,500.00 "as and for an equalization of the values of the marital portion of the pensions divided herein." After the divorce, Lupe petitioned the Family Court for a Qualified Domestic Relations Order ("QDRO") revoking Plaintiff's designation as the beneficiary.

Lupe and Defendant Judy Carmona were married on November 30, 1997. That same month, Lupe filed a motion asking the Family Court to create a constructive trust for the benefit of his new wife, Defendant Judy Carmona. Lupe contended that the divorce decree awarded him the entirety of both pension plans, including the survivor benefits. He further asserted that Plaintiff would be unjustly

enriched if she dispossessed him of this property. Plaintiff claimed that survivor benefits are not death benefits, but an irrevocable interest under both the IATSE and HILTON plans, and thus they were her sole property. On March 25, 1998, the Family Court held Plaintiff had not waived her rights to the survivor benefits, but the providers could change Defendant's designation as beneficiary if they chose.

However, one day after Lupe's death on April 15, 1999, the Family court ordered the administrators of the IATSE and HILTON plans to change the beneficiary designation pursuant to Lupe's directions. The Family Court stated that it would order the establishment of a constructive trust for Defendant Judy Carmona's benefit if the administrators failed to make the change. Plaintiff argued that after Lupe's death, he and his estate were divested of any further interest in the pension plans, leaving Defendant Judy Carmona with no interest in the survivor benefits because those benefits were now vested in Plaintiff.

Plaintiff appealed the Family Court's orders to the Nevada Supreme Court. On October 21, 2003, the Nevada Supreme Court affirmed the Family Court's order establishing a constructive trust. It found the divorce decree awarded Lupe his pension rights including the survivor benefits. The Court also addressed Plaintiff's argument that the Employee Retirement Income Security Act ("ERISA") preempted the Family Court's creation of a constructive trust relating to ERISA regulated benefits. The Court stated that although ERISA prohibits alienation of benefits other than to the

designated participant or survivor beneficiary, the Retirement Equity Act ("REA") of 1984 provided an exception to ERISA's anti-alienation provision, which allowed the designation of an alternate payee through a QDRO.

The Nevada Supreme Court also found Plaintiff had waived her rights to the survivor benefits from Lupe's plans upon her receipt of the $1,500.00 payment. Additionally, it found the Family Court's creation of the constructive trust was essential to effectuate Lupe's wishes and it would be inequitable to allow Plaintiff to retain the benefits because she was no longer married to Lupe at the time of his death.

Plaintiff appealed this decision to the United States Supreme Court. On April 19, 2004, the United States Supreme Court denied certiorari. In addition to Plaintiff's appeals to the Nevada Supreme Court and the United States Supreme Court, on February 4, 2004, a United States Bankruptcy Court held that Plaintiff did not have a legal or equitable interest in the survivor benefits. Further, in two separate prior actions, this Court has denied Plaintiff relief. On August 14, 2001, Chief Judge Philip M. Pro held that because ERISA permitted state and federal courts to exercise concurrent jurisdiction, the Court would not "relitigate issues where another court had jurisdiction and made a final determination." *Kester v. Gaston*, Case No. CV-S-01-0431-PMP (PAL), Order, Doc. # 36 at 4 (D.Nev. Aug. 14, 2001).

Then, on April 2, 2004, the Family Court issued an order requiring Plaintiff to deposit the survivor benefit funds she received into a constructive trust. The Family Court noted that both the Bankruptcy Court and the Nevada Supreme Court had ruled the funds in question were not Plaintiff's property. That same day, the Family Court entered two QDRO's ordering the two plans to pay the survivor benefits either to Defendant Judy Carmona or to a constructive trust account for Defendant Judy Carmona's benefit. On April 28, 2004, Plaintiff filed a Notice of Removal in Federal District Court for the District of Nevada. *See Carmona v. Carmona*, Case No. CV-S-04-0534-PMP (RJJ), Petition for Removal, Doc. # 1 (D.Nev.).

On August 25, 2004, the Court remanded the action back to Family Court. The Court found that Plaintiff had failed to timely remove the case, and had waived her right to remove the ERISA claim. *See id.* at 6. The Court recited part of its previous order in CV-S-01-0431-PMP notifying Plaintiff that a "United States District Court does not have the authority to review a final judgment" of a state court proceeding citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). *Id.* at 7.

Now, Plaintiff has filed suit in Federal District Court for the third time. In an attempt to avoid the results of claim and issue preclusion as well as the *Rooker-Feldman* doctrine, Plaintiff has brought suit alleging exclusive federal court jurisdiction and has named the two pension trust funds as defendants in addition to Defendant Judy Carmona. Additionally, the IATSE Trustees have filed a

cross-claim against Defendant Judy Carmona seeking declaratory relief. Defendant Judy Carmona has filed a motion to dismiss Plaintiff's complaint and IATSE's cross-claim. Essentially, Defendant Carmona asserts that res judicata and the Rooker-Feldman doctrine preclude those claims.

II. Rooker-Feldman Doctrine

A. Application to Plaintiff's Complaint

The *Rooker-Feldman* doctrine is based on the statutory proposition that federal district courts are courts of original, not appellate jurisdiction. *See In re Sasson*, 2005 WL 2210195 (9th Cir.2005)(citing 28 U.S.C. § 1331, 1332). Therefore, federal district courts have "no authority to review the final determinations of a state court in judicial proceedings." *Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir.1986). Only the Supreme Court has original jurisdiction to review the final judgments or decrees rendered by the highest state court of a state in which a decision could be had. *See Sasson* at 5 (citing 28 U.S.C. § 1257(a)).

The United States Supreme Court has recently clarified the limit of the *Rooker-Feldman* doctrine: "The Rooker-Feldman doctrine ... is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corporation v. Saudi Basic Inds. Corp.*, 125

S.Ct. 1517, 1521-22 (2005). Therefore, three factors must exist in the present action for the Court to find that it lacks subject matter jurisdiction over the claims raised by Plaintiff. First, the case must be brought by a state-court loser. Second, the state-court loser must be complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced. Finally, the complaint must invite review and rejection of the state-court judgments.

All three factors are satisfied in this case, and thus, this Court lacks subject matter jurisdiction over Plaintiff's complaint. First, Plaintiff is a state-court loser. Plaintiff is complaining of injuries caused by the state court judgments: primarily, the Nevada Supreme Court's determination that the state court action was not preempted by ERISA and that Plaintiff had executed a valid waiver of her spousal interest in Lupe's pension. That determination was rendered on October 21, 2003 before Plaintiff's claim was filed in this action on September 20, 2004. Finally, though Plaintiff attempts to artfully draft the complaint, it is clear from the pleadings that Plaintiff is inviting this Court to review and reject the determinations of the Nevada Supreme Court. Plaintiff's complaint is the classic case where the *Rooker-Feldman* doctrine declares such suits "out of bounds",[1] and it must be

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[1] Plaintiff has asserted that as pled the complaint arises under the exclusive jurisdiction of this Court and as such, an exception applies barring application of the Rooker-Feldman doctrine. See G.C. and K.B. Investments v. Wilson, 326 F.3d 1096, 1103 n. 4 (9th Cir.2003). However, that argument ignores the fact that concurrent jurisdiction existed

dismissed for want of subject-matter jurisdiction. *See id.* at 1521.

B. Application to IATSE's Cross-claim

However, *Rooker-Feldman* does not bar IATSE's cross-claim. Despite Defendant Judy Carmona's strident assertions that the IATSE Trustees should be considered in privity with Plaintiff, Defendant Judy Carmona has not cited the Court to any relevant legal authority that leads to that conclusion. *Rooker-Feldman* bars only the losing party in the state suit, and has no application to a federal suit brought by a nonparty to the state suit. *See id.* at 1523 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1005-1006 (1994)).

Furthermore, the principles of res judicata do not bar IATSE's cross-claim for the same reason. A federal action may be barred by the doctrine of res judicata where an earlier lawsuit: (1) involved the same claim as the present suit; (2) reached a final judgment on the merits; and (3) involved the same parties or their privies. *See Blonder-Tongue Laboratories v. Univ. Of Ill. Found.*, 402 U.S. 313, 323-324 (1971). A person may be precluded from pursuing a claim if a prior party so closely represented his legal interests as to be his virtual

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when the action was proceeding in state court Inexplicably, the parties failed to remove the action before the thirty-day limit expired leading this Court to find in CV-S-04-0534-PMP that Plaintiff had waived her right to removal of the ERISA claim Thus Plaintiff implicitly subjected herself to the final determination of the state court.

representative. *See Nordhorn v. Ladish Co., Inc .*, 9 F.3d 1402 (9th Cir.1993). Defendant Judy Carmona has not adequately established that Plaintiff so closely represented the IATSE Trustees' legal interests as to be their virtual representative. Therefore, the Court declines to dismiss the IATSE Trustees' cross-claim.

However, the Court recognizes that the IATSE Trustees and HILTON could have prevented some of the extensive and unnecessary litigation in this matter simply by interpleading the funds in issue and seeking a determination as to whether their determinations that the domestic relations orders in dispute were qualified or not were accurate.[2] Certainly such a course of action would have been more prudent than filing a cross-claim that could subject the pension funds to an award of attorney's fees by taking an adversarial stance rather than by proceeding as a "neutral stakeholder in a typical statutory interpleader action." *Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise,* 234 F.3d 415, 427 (9th Cir.2000). In fact, the parties seem to be positioning themselves to resolve the issue of whether the plan participant's retirement cuts off a putative alternate payee's right to obtain an enforceable QDRO, an issue the *Tise* court

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[2] 29 U.S.C. § 1056(d)(3)(H)(I) allows a court of competent jurisdiction to determine whether a state court's order meets the statutory requirements to be a QDRO. *See, also, Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise,* 234 F.3d 415, 421, 426 (9th Cir.2000).

recognized was unresolved in the Ninth Circuit. *See id.* at 423 n. 6.

III. Conclusion

Accordingly, IT IS HEREBY ORDERED that Defendant Judy Carmona's Motion to Dismiss (# 4) is **DENIED as moot;**

IT IS FURTHER ORDERED that Defendant IATSE Trustee's Motion to Expedite Dispositive Motion Practice (# 8) is **GRANTED;**

IT IS FURTHER ORDERED that Defendant IATSE Trustee's Motion to Stay State Court Proceedings (# 9) is **DENIED;**

IT IS FURTHER ORDERED that Defendant Judy Carmona's Motion to Dismiss Cross-claim (# 18) is **DENIED as moot;**

IT IS FURTHER ORDERED that Defendant Judy Carmona's Motion to Exceed Length of Reply (# 21) is **GRANTED;**

IT IS FURTHER ORDERED that Defendant Judy Carmona's Motion to Dismiss Amended Complaint and Cross-claim (# 31) is **GRANTED in part and DENIED in part;**

IT IS FURTHER ORDERED that Plaintiff's complaint is **DISMISSED;**

IT IS FURTHER ORDERED that Defendant Judy Carmona's Motion to Dismiss the Cross-claim is **DENIED;**

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (# 35) is **DENIED as moot;**

IT IS FURTHER ORDERED that Defendant Judy Carmona's Motion for Extension of Time to File an Opposition to Cross-Claimant's Motion for Summary Judgment (# 39) is **GRANTED;**

IT IS FURTHER ORDERED that Motions (# 41, 42, 43, 52, 57 and 62) are **DENIED as moot;**

IT IS FURTHER ORDERED that Defendant Judy Carmona's Motion to Withdraw Countermotion (# 44) is **GRANTED.**

DATED this 30th day of September 2005.

s/
Kent J. Dawson
United States District Judge

APPENDIX C

SUPREME COURT OF NEVADA

No. 35851

JANIS CARMONA, A.K.A. JANIS KESTER,

Plaintiff,

v.

JUDY CARMONA, AS SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA, DECEASED,

Respondent.

October 21, 2003.

ORDER OF AFFIRMANCE

These are two consolidated appeals from several district court orders in the same district court case. The orders appealed from impose a constructive trust on survivor benefits, designate a successor representative, and award attorney fees.

Lupe Carmona was formerly married to appellant Janis Carmona. Before marring Janis, Lupe worked for the International Alliance of Theatrical Stage Employees (IATSE). During marriage, both Lupe and Janis worked for the Hilton Hotel Corporation. Lupe was eligible for pension benefits with IATSE and the Hilton Hotel Corporation and elected the qualified joint and survivor annuity (QJSA) option for married couples on his pensions. Janis was listed as his survivor beneficiary for both plans. Lupe retired in 1992 and began receiving payments from his pensions.

In November 1997, Lupe and Janis divorced. In the divorce decree, Lupe was awarded his pensions as his separate property, but was ordered to pay Janis $1,500 for her marital portion of his pension.

After Lupe married respondent Judy Walkington shortly after his divorce from Janis, he tried to change the designation of his survivor beneficiary from Janis to Judy. However, representatives of both Hilton Hotel and IATSE informed Lupe that a change of beneficiary after commencement of retirement is prohibited. The Hilton Hotel representative added that the Employee Retirement Income Security Act (ERISA) prohibits such a change, unless a Qualified Domestic Relations Order (QDRO) "which waives the spouse's right to survivor benefits is served on the Plan." Accordingly, Lupe requested the district court to enter a QDRO ordering his pension plan administrators to grant his election of a new survivor beneficiary.

At first, the district court refused to issue a QDRO that changed the beneficiary. But subsequently, after Lupe's death, the district court found that the parties had agreed that Lupe's retirement benefits, including the survivor benefits, were his sole and separate property. The district court ordered the plan administrators to change the survivor beneficiary in accordance with Lupe's request, and if they did not, the district court stated that it "will Order the establishment of a Constructive Trust for the benefit of Lupe's designated beneficiary wherein the survivorship funds, if received by Janis, will be held in trust for receipt by Lupe's designated beneficiary." The district court subsequently issued an order directing Janis to establish a constructive trust of the survivorship funds from Lupe's-retirement plans for the benefit of Judy. Janis appeals.[1]

Janis's argument that the district court's first order refusing to impose a QDRO is res judicata has no merit. In the first order, the district court refused to issue the QDRO, but with additional information and arguments, the court could and did issue a QDRO. The first order was not final as is required for res judicata to apply. There was nothing inconsistent between the two orders, either in law or fact.

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[1] Judy argues that Janis's appeal of the district court's April 16, 1999 order and constructive trust order of June 22, 1999, should be dismissed because Janis's notice of appeal of March 21, 2000, was untimely pursuant to NRAP 4. Judy's argument is without merit as Janis's motions were tolling motions under NRCP 52(b) and NRCP 59. *See* NRAP 4(a)(2).

Janis's argument that the constructive trust unlawfully modifies the divorce decree is also without merit. The constructive trust does not modify the divorce decree since the district court concluded that in the divorce decree, Lupe's pension rights, including the survivor benefits, were awarded as his sole and separate property.

Janis argues that all district court orders entered during the period in which there was no designated successor representative for Lupe are void. Before a judgment may affect a deceased party's estate, the personal representative of the deceased party must be substituted as a party.[2] Without such substitution, a judgment is voidable.[3] However, in this case, two months after Judy was substituted, the district court reconsidered all the orders issued during the time there was no successor representative. Therefore, the district court's orders are not void.

Janis's most important argument is that ERISA preempts the district court's orders and the constructive trust relating to ERISA-regulated benefits. Both of Lupe's pensions are regulated by ERISA, and interplay between ERISA and state law is not always clear. ERISA specifically provides that it "shall supercede any and all State laws insofar as they may now or hereafter relate to any

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[2] *Koester v. Estate of Koester*, 101 Nev. 68, 72, 693 P.2d 569, 572 (1985).

[3] *Id.*

employee benefit plan."[4] ERISA also prohibits alienation of benefits other than to the designated participant or survivor beneficiary.[5] The Retirement Equity Act of 1984 provides an exception to the anti-alienation provisions of ERISA by allowing designation of an alternate payee through the issuance of a QDRO.[6] The statute defines a QDRO, in relevant part, as a domestic relations order "which creates or recognizes the existence of an alternate payee's right to. or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan."[7]

The pension plans offered by Lupe's employers were required by ERISA to offer married employees survivor benefits.[8] One of ERISA's provides that the joint and survivor annuity form of benefit can be waived by the participant, Lupe, with the spouse's written consent in the 90-day period prior

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[4] 29 U.S.C.S. § 1144(a) (Lexis 1998); *see also Villescas v. CNS Ins. Co.*, 109 Nev. 1075, 1080, 864 P.2d 288, 292 (1993); *Marcoz v. Summa Corporation*, 106 Nev. 737, 743, 801 P.2d 1346, 1350 (1990).

[5] 29 U.S.C.S. § 1056(d)(1) (Lexis 1998).

[6] 29 U.S.C.S. § 1056(d)(3).

[7] 29 U.S.C.S. § 1056(d)(3)(B)(i)(I).

[8] 29 U.S.C.S. § 1055(a)(1) & (b)(1) (Lexis 1998); *see also* Ronald J. Cooke, *ERISA Practice and Procedure* § 4:44, 4-174 (2d ed.2002).

to the retirement date.[9] Here, Lupe retired and began receiving payments from his pensions in 1992, at which time he was still married to Janis. Therefore, it is Janis's contention that the survivor benefits irrevocably vested in her as Lupe's named beneficiary upon the date of his retirement.

Judy responds that Janis waived her survivor beneficiary benefits in the divorce decree. Federal courts disagree as to whether ERISA authorizes a claim of waiver, but a majority of federal circuits have concluded that "ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary" of ERISA-regulated benefits.[10] Common law is employed to effectuate the clear intent of the parties as to who is the beneficiary.[11] "[W]ho is entitled to the proceeds of an ERISA plan ... may depend upon more than merely the plan documents, and may be properly defined by reference to ... the particular facts of the case."[12]

In this case, the district court found that Janis agreed in the divorce action that Lupe would receive the entirety of his retirement plans upon paying her $1,500. Once Lupe paid Janis the

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[9] 29 U.S.C. § 1055(c).

[10] *Melton v. Melton*, 324 F.3d 941, 945 (7th Cir.2003); *see also Manning v. Hayes*, 212 F.3d 866, S71 (5th Cir.2000), *cert. denied.* 532 U.S. 941 (2001).

[11] Manning, 212 F.3d at 871; *Silber v. Silber*, 786 N.E.2d 1263, 1268 (N.Y.2003).

[12] *Id.*

$1,500, she had no more interest in his retirement plans, including the survivor benefits. The district court found that the survivor benefits were not an omitted asset in the divorce decree, but were contemplated by the parties and that each received the total benefit package of their respective pension plans. The district court's findings are supported by substantial evidence. Since the pension plan administrators would not recognize Lupe's change of beneficiary and payments were being made to Janis, the district court ordered that Janis hold the proceeds received in constructive trust for Judy.

Janis also argues that the imposition of a constructive trust relating to an employee benefit plan is preempted by ERISA. However, ERISA does not preclude the imposition of a constructive trust after benefits are distributed to a beneficiary according to the pension plan.[13] Additionally, we agree with the Hawaii Supreme Court that ERISA does not govern our interpretation of the divorce decree:

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[13] *Central States, SE & SW Areas Pension v. Howell*, 227 F.3d 672, 678-79 (6th Cir.2000) (holding that a constructive trust could be imposed on employee welfare plan benefits after distribution to beneficiary). The anti-alienation clause does "not ... protect private pension benefits once paid to and received by the beneficiary." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 39 F.3d 1078, 1081 (10th Cir.1994); *see also Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 955 (9th Cir.1998), *overruled on other grounds by Egelhoff v. Egelhoff*, 532 U.S. 141, 146, 151-52 (2001).

> The resolution of competing claims involving such matters as alimony, child support, and property (including pension interests) accrued during a marriage is entirely with the province of state domestic relations law ... ERISA's 'qualification' of such domestic relations orders is concerned solely with enabling the plan to fulfill its fiduciary duties by ensuring that its obligations are clear and its liabilities are kept within the bounds of its contract and federal law.[14]

A constructive trust may be imposed if: *"(1)a confidential* relationship exists between the parties; (2) retention of legal title by the holder thereof against another would be inequitable; and (3) the existence of such a trust is essential to the effectuation of justice."[15] In this case, there was a confidential relationship between Janis and Lupe, as they were previously married and Janis was designated as Lupe's survivor beneficiary. The district court found that Janis's retention of the pension benefits would be inequitable since Lupe was no longer married to Janis at the time of his death, and he specifically requested that Judy be named beneficiary of his survivor benefits. The pension plan administrators would not change the beneficiary because of formal plan requirements. A constructive trust is essential to effectuate the

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[14] *Torres v. Torres*, 60 P.3d 798, 817 (Haw.2002).

[15] *Locken v. Locken*, 98 Nev. 369, 372, 650 P.2d 803, 805 (1982).

wishes of the plan participant. The district court's imposition of a constructive trust was proper.

Janis disputes the district court's award of attorney fees of $15,000 to Judy as arbitrary and lacking a statutory basis. Pursuant to NRS 125.150(3), a district court has wide discretion in awarding attorney fees in an action for divorce when such fees are raised in the pleadings, and its determination will-not be disturbed upon appeal absent abuse.[16] We have previously concluded that the district court has discretion to award attorney fees in post-divorce proceedings.[17] Upon a review of the various and extensive proceedings, we determine that the district court did not abuse its discretion in granting attorney fees.

We ORDER the judgment of the district court AFFIRMED.

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[16] *Burr v. Burr*, 96 Nev. 480, 482, 611 P.2d 623, 624 (1980).

[17] *Halbrook v. Halbrook*, 114 Nev. 1455, 1460-61, 971 P.2d 1262, 1266 (1998).

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 06-15581, 06-15938

JANIS CARMONA,

Plaintiff,

v.

JUDY CARMONA; HILTON HOTELS CORPORATION, RETIREMENT PLAN,

Defendants,

v.

NEVADA RESORT ASSOCIATION INTERNATIONAL ALLIANCE OF THEATRICAL AND STATE EMPLOYEES LOCAL 720 PENSION TRUST (I.A.T.S.E. TRUSTEES),

Cross-Claimant-Appellant,

v.

JUDY CARMONA, SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA DECEASED,

Cross-Defendant-Appellee.

JANIS CARMONA, A.K.A. JANIS KESTER,

Plaintiff-Appellant,

v.

JUDY CARMONA, SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA DECEASED; HILTON HOTELS CORPORATION, RETIREMENT PLAN,

Defendants-Appellees.

September 10, 2010

Before: Hawkins, Thomas, and Clifton, Circuit Judges

ORDER

The panel has voted to deny (1) Cross-defendant-Appellee Judy Carmona's Petition for Rehearing En Banc, filed May 17, 2010, and (2) Plaintiff-Petitioner Janis Carmona's Petition for Panel Rehearing and for Rehearing En Banc, filed June 16, 2010. Judges Thomas and Clifton have voted to deny the petitions for rehearing en banc; and Judge Hawkins so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petitions for rehearing en banc are DENIED.

The Motion for Leave to File Amicus Curiae Brief Supporting Appellee's Petition for Rehearing or Rehearing En Banc and Motion to Extend the Time of to File Amicus Curiae Brief, filed August 20, 2010, is DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 06-15581, 06-15938

JANIS CARMONA,

Plaintiff,

v.

JUDY CARMONA; HILTON HOTELS CORPORATION, RETIREMENT PLAN,

Defendants,

v.

NEVADA RESORT ASSOCIATION INTERNATIONAL ALLIANCE OF THEATRICAL AND STATE EMPLOYEES LOCAL 720 PENSION TRUST (I.A.T.S.E. TRUSTEES),

Cross-Claimant-Appellant,

v.

JUDY CARMONA, SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA DECEASED,

Cross-Defendant-Appellee.

JANIS CARMONA, A.K.A. JANIS KESTER,

Plaintiff-Appellant,

v.

JUDY CARMONA, SUCCESSOR REPRESENTATIVE OF LUPE N. CARMONA DECEASED; HILTON HOTELS CORPORATION, RETIREMENT PLAN,

Defendants-Appellees.

September 21, 2010

Before: Hawkins, Thomas, and Clifton, Circuit Judges

ORDER

The motion for stay of mandate pending filing of a petition for certiorari, filed on behalf of Janis Carmona on September 16, 2010, is GRANTED.

Pursuant to Fed. R. App. P. 41(d)(2)(B), the stay will not extend more than 90 days from the date of denial of the petition for rehearing unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the Clerk of this court in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

APPENDIX F

DISTRICT COURT
CLARK COUNTY, NEVADA

No. D181580

LUPE CARMONA,

Plaintiff,

v.

JANIS CARMONA,

Respondent.

October 27, 1994

COMPLAINT FOR DIVORCE

COMES NOW Plaintiff, LUPE N. CARMONA, by and through his counsel, GERALD F. NEAL, ESQ., and for cause of action states:

I.

For more than six (6) weeks preceding the commencement of this action, Plaintiff has been, and now is, an actual and bona fide resident and domiciliary of the State of Nevada.

II.

Plaintiff and Defendant were intermarried in the City of Las Vegas, State of Nevada, on or about the 7th day of March 1988, and ever since have been, and now are, husband and wife.

III.

That there are no minor children born the issue of said marriage; there are no adopted children; and to the best of Plaintiff's knowledge, Defendant is not pregnant at this time.

IV.

That there is community property of the parties hereto consisting of but not limited to the following:

(a) 1989 Toyota Cressida automobile to which there are no encumbrances;

(b) 1990 Toyota 4x4 V-6 Pick Up Truck with encumbrances thereon;

V.

That there is sole and separate property of the Plaintiff described as follows:

(a) The family residence situated at 7928 Wishing Well Road, Las Vegas, Nevada 89123, with encumbrance thereon;

(b) The residence situated at 4208 Sheppard Drive, Las Vegas, Nevada 89121, with encumbrance thereon;

(c) The residence situated at 2115 San Simeon Street, Las Vegas, Nevada 89108, with encumbrance thereon;

(d) The residence situated at 204 Potential Drive, Hollister, Missouri, with encumbrance thereon;

(e) 1978 Chevy 4x4 Pick Up Truck to which there are no encumbrances;

(f) Social Security Benefits;

(g) Pension through the Hilton Hotels;

(h) Pension through the Carpenter's Union;

(i) I.A.S.T.E. Pension;

(j) Any and all shares of stock through Merrill Lynch;

(k) Any and all shares of stock through Ozark Mountain Bank.

VI.

That there is community debts of the parties hereto consisting of but not limited to the following to be awarded to Plaintiff as his sole and separate obligations holding Defendant harmless there from:

(a) Dovenmuehle Mortgage Company, account # 158707-0, approximate balance of $19,841.44 as and for the 1st mortgage on the family residence situated at 7928 Wishing Well Road, Las Vegas, Nevada 89123;

(b) I.A.S.T.E. Mortgage Company, account # 452003, approximate balance of $5,450.57 as and for the 2nd mortgage on the family residence situated at 7928 Wishing Well Road, Las Vegas, Nevada 89123;

(c) Metmor Financial, Inc., account # 931635-7, approximate balance of $62,393.55 as and for the mortgage on the residence situated at 4208 Sheppard Drive, Las Vegas, Nevada 89121;

(d) ITT Residential/Capital Servicing, Inc., account # 5486085, approximate balance $50,582.46 as and for the residence situated at 2115 San Simeon Street, Las Vegas, Nevada 89108;

(d) Ozark Mountain Bank, account # 002011369, approximate balance of $108,567.95 as and for the mortgage on the residence situated at 204 Potential Drive, Hollister, Missouri.

(e) I.A.S.T.E., account # 1198001, approximate balance of $4.093.10 as and for the obligation on the 1990 Toyota 4x4 V-6 Pick Up Truck.

VII.

That any debt incurred by either party from and after the date of separation of the parties being October 26, 1994, shall be the sole and separate debt of the party incurring that debt, and each party shall hold the other harmless from any such debt.

VIII.

That the parties hereto are incompatible in marriage.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. That the bonds of matrimony now and heretofore existing between the Plaintiff and Defendant be dissolved, and that the Plaintiff be granted an absolute Decree of Divorce and that each of the parties hereto be restored to the status of a single unmarried person.

2. That the court enter an order dividing the community property of the parties in an equitable manner as follows:

To Plaintiff:

(a) 1990 Toyota 4x4 V-6 Pick Up Truck with encumbrances thereon;

(b) Personal items and effects now in Plaintiff's possession.

To Defendant:

(a) 1989 Toyota Cressida automobile to which there is no encumbrances;

(b) Personal items and effects not in Defendant's possession.

2. That this Court confirm Plaintiff's sole and separate property as set forth in the complaint hereinabove.

3. That Plaintiff assume the community debts of the parties as set forth in the complaint hereinabove holding Defendant harmless therefrom.

4. That any debt incurred by either party from and after the date of separation of the parties being October 26, 1994, shall be the sole and separate debt of the party incurring that debt, and that each party shall hold the other harmless from any such debt.

5. For Such other and further relief as the Court may deem just and proper.

GERALD F. NEAL, ESQUIRE

By: s/ /
GERALD F. NEAL, ESQ.
Bar No. 000353
P.O. Box 93118-98
Las Vegas, Nevada 89183-3118
ATTORNEY FOR PLAINTIFF

APPENDIX G

DISTRICT COURT
CLARK COUNTY, NEVADA

No. D181580

LUPE N. CARMONA,

Plaintiff,

v.

JANIS CARMONA,

Defendant.

JANIS CARMONA,

Counterclaimant,

v.

LUPE N. CARMONA,

Counterdefendant.

November 23, 1994

ANSWER TO COMPLAINT FOR DIVORCE AND COUNTERCLAIM

COMES NOW, the Defendant/Counterclaimant, JANIS CARMONA, (hereinafter referred to as Defendant) by and through her attorney PETER J. BELLON, ESQ., and answers the Plaintiff/Counterdefendant's (hereinafter referred to as Plaintiff) Complaint and makes her Counterclaim for divorce as follows:

I.

Defendant admits each and every allegation in Paragraphs I, II, and III of Plaintiff's Complaint for Divorce.

II.

Defendant denies Paragraphs V, VII and VIII of Plaintiff's Complaint for Divorce.

III.

Defendant admits to the allegation that there is community property of the Parties but denies each and every ether allegation contained in Paragraph IV of Plaintiff's Complaint.

IV.

Defendant herein admits that there are community debts of the Parties but denies each and every other allegations contained in Paragraph VI of Plaintiff's Complaint.

COUNTERCLAIM

COMES NOW, Counterclaimant, JANIS CARMONA, and for her claim for relief against the Counterdefendant, LUPE N. CARMONA, alleges as follows:

I.

That the Counterclaimant, JANIS CARMONA, is, and for more than six weeks immediately prior to the filing of this action been, an actual, bona fide resident and. domiciliary of the County of Clark, State of Nevada, actually, physically and corporally present and residing and being domiciled therein during all of said period.

II.

That the Counterclaimant, JANIS CARMONA, and Counterdefendant, LUPE N. CARMONA, intermarried at Las Vegas, Nevada on the 7th day of March, 1988, and ever since said date have been and now are husband and wife.

III.

That there are no minor children born the issue of this marriage; no children were adopted during the course of this marriage and to the best of her knowledge Counterclaimant is not pregnant at this time.

IV.

That there is community property of the parties hereto that need be adjudicated by the Court, including, but not limited to, the following:

1. 1989 Cressida automobile;

2. 1990 Toyota 4X4 V-6 Pickup Truck, subject to encumbrances;

3. 1978 Chevy 4X4 Pickup Truck;

4. Community interest in the equity in the property located at 7928 Wishing Well Road, Las Vegas, Nevada, 89123, subject to encumbrances;

5. Community interest in the equity in the property located at 4208 Sheppard Drive, Las Vegas, Nevada, 89121, subject to encumbrances;

6. Real property located at 2115 San Simeon Street, Las Vegas, Nevada, 89108, subject to encumbrances;

7. Real property located at 204 Potential Drive, Hollister, Missouri, subject to encumbrances;

8. Plaintiff's pension through the Hilton Hotel;

9. Any and all shares of stock through Merril Lynch;

10. Any and all shares of stock through Ozark Mountain Bank;

11. Plaintiff's I.A.S.T.E. Pension;

12. Household furniture and furnishings located in the Hollister, Missouri, residence; and

13. Proceeds from the U.S. Gypsum Lawsuit.

V.

That Plaintiff believes that a fair and equitable division of the community property is as follows:

Plaintiff is to receive as her sole and separate property the following items:

1. 1989 Cressida automobile;

2. One-half of the community interest in the equity in the property located at 7928 Wishing Well Road, Las Vegas, Nevada, 89123, subject to encumbrances;

3. One-half of the community interest in the equity in the property located at 4208 Sheppard Drive, Las Vegas, Nevada, 89121, subject to encumbrances;

4. One-half the equity in the real property located at 2115 San Simeon Street, Las Vegas, Nevada, 89108, subject to encumbrances;

5. One-half the equity in the real property located at 204 Potential Drive, Hollister, Missouri, subject to encumbrances;

6. Pro Rata share of Plaintiff's pension through the Hilton Hotel;

7. Pro Rata share of Plaintiffs I.A.S.T.E. Pension;

8. One-half of any and all shares of stock through Merril Lynch;

9. One-half of any and all shares of stock through Ozark Mountain Bank;

10. One-half of the furniture and furnishings located in the Hollister, Missouri, residence; and

11. Pro Rata share of the proceeds from the U.S. Gypsum Lawsuit.

Defendant is to receive as his sole and separate property the following items:

1. 1990 Toyota 4X$ v-6 Pickup Truck, subject to encumbrances;

2. 1978 Chevy 4X4 Pickup Truck;

3. Remaining equity in the property located at 7928 Wishing Well Road, Las Vegas, Nevada, 89123, subject to encumbrances;

4. Remaining equity in the property located at 4208 Sheppard Drive, Las Vegas, Nevada, 89121, subject to encumbrances;

5. One-half the equity in the real property located at 2115 San Simeon Street, Las Vegas, Nevada, 89108, subject to encumbrances;

6. One-half the equity in the real property located at 204 Potential Drive, Hollister, Missouri, subject to encumbrances;

7. Remainder of his pension through the Hilton Hotel;

8. Remainder of his I.A.S.T.E. Pension;

9. One-half of any and all shares of stock through Merril Lynch;

10. One-half of any and all shares of stock through Ozark Mountain Bank;

11. One-half of the furniture and furnishings located in the Hollister, Missouri, residence; and

12. Remainder of the proceeds from the U.S. Gypsum Lawsuit.

VI.

That there are community debts of the parties hereto that need be adjudicated by the Court, including, but not limited to, the following:

1. Dovenmuehle Mortgage Company, Account #158707-0, approximate balance of -$19,841.44;

2. I.A.S.T.E. Mortgage Company, Account #452003, approximate balance of $5,450.57;

3. Metmor Financial, Inc., Account #931635-7, approximate balance of $62,393.55;

4. ITT Residential/Capital Servicing, Inc., Account #5486085, approximate balance of $50,582.46;

5. Ozark Mountain Bank, Account #002011369, approximate balance of $108,567.95;

6. I.A.S.T.E. Account #1198001, approximate balance of $4,093.10;

7. Various credit cards including but not limited to the following:

(a) Dillards;

(b) First Interstate Bank Mastercard;

(c) Sears;

(d) J.C Penneys;

(e) Texaco card;

(f) First Interstate Bank Visa;

(g) Union Privilege Mastercard;

VII.

There exists between Counterclaimant, JANIS CARMONA, and Counterdefendant, LUPE N. CARMONA, conflicts in personalities and dispositions which are so deep as to be irreconcilable and irremediable, and which render it impossible for the parties to continue to live together in a normal marital relationship as husband and wife; and therefore, the

Counterclaimant and Counterdefendant have become, and continue to be, incompatible in marriage.

VIII.

That Counterclaimant desires that her maiden name of Kester be restored to her.

IX.

That is has become necessary for Counterclaimant to engage the services of an attorney to prosecute this action; and therefore Counterclaimant is entitled to recover reasonable attorney's fees, together with costs of suit.

WHEREFORE, Counterclaimant, JANIS CARMONA, prays judgment as follows:

1. That the bonds of matrimony heretofore and now existing between Counterclaimant and Counterdefendant be dissolved; that the Counterclaimant be granted an absolute decree of divorce and that each of the parties hereto be restored to the status of a single, unmarried person;

2. That the Court make an equitable division of the community property of the parties as' described above;

3. That the Court make an equitable division of the community debts and obligations of the parties;

4. That Counterclaimant's maiden name of Kester be restored to her.

5. That the Counterclaimant be awarded reasonable attorney's fees, costs and allowances for prosecution of this action; and

6. For such other and further relief as the Court may deem meet and proper.

The Law Office of
Peter J. Bellon, Esq.

By: s/ /
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Las Vegas, Nevada 89101
Attorney for Counterclaimant